MISSISSIPPI LAW JOURNAL

APPLICATION OF DATA PROCESSING TECHNIQUES TO THE UNIFORM COMMERCIAL CODE FILING SYSTEM: A MODERN PROPOSAL FOR MISSISSIPPI

James L. Robertson

TORTS OR WARRANTIES?

Gibson B. Witherspoon

STATE BAR SECTION: PANEL DISCUSSION ON SECURED TRANSACTIONS

March 1968

VOLUME XXXIX NUMBER 2

MEMPHIS, TENNESSEE, CENTER OF THE MID-SOUTH.
FIRST NATIONAL BANK OF MEMPHIS, CENTER FOR
BROAD RANGE TRUST SERVICES IN THE MID-SOUTH.

RESEARCH ASSISTANCE NOW AVAILABLE TO MISSISSIPPI LAWYERS

Take advantage of the library facilities of the University of Mississippi School of Law by sending your legal problems to the Phi Alpha Delta Legal Research Exchange. The Exchange will research your problems and/or xerox any materials you need from the law library. Qualified students will research your legal problems for the nominal cost of $4.00 per hour plus a base fee of $5.00 for each problem handled by the exchange. Xerox copies of materials in the library cost ten cents per page. All profits are given to the Ole Miss Law Alumni Fund. For further information write or call:

LEGAL RESEARCH EXCHANGE
School of Law
University, Mississippi 38677
Phone 232-6066

Cooperating with attorneys...

Deposit Guaranty's Trust Department welcomes every opportunity of working with attorneys on estate planning for their clients. Such cooperative efforts help to bring financial security to many individuals and families in this area. Write or call us anytime.

TRUST DEPARTMENT

DEPOSIT GUARANTY NATIONAL BANK

Grow With Us

JACKSON, MISSISSIPPI

MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

planning a library isn't cheap

it's free!

There's no need to stress the importance of *planning* when it comes to your library. Some books duplicate effort. Others work together naturally to save you hours of time. Our representative can give you the advice you need in planning a library. He's an expert. After all he's been doing it day after day for years. And his advice is free. Write us for a survey of your future library needs today.

WEST PUBLISHING COMPANY
50 KELLOGG BLVD. ST. PAUL, MINN. 55102

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIX MARCH 1968 NUMBER 2

CONTENTS

LEADING ARTICLES

Application of Data Processing Techniques To The Uniform Commercial Code Filing System: A Modern Proposal For Mississippi ..... *James L. Robertson* 173

Torts or Warranties? ..... *Gibson B. Witherspoon* 199

STATE BAR SECTION

Panel Discussion on Secured Transactions 217

Hon. Grant Gilmore, Moderator
Hon. Peter F. Coogan
Hon. Robert Braucher
Hon. Marvin A. Cohen
Hon. George W. Stengel

STUDENT COMMENTS

The Indigent and Consumer Credit 261

STUDENT NOTES

Bail—An Examination of Release on Recognizance 303

Evidence—Admissibility of Expert Opinion Testimony in Motor Vehicle Accident Cases 317

Privileged Communications Between Clergy and Penitent—Need of Statute in Mississippi 324

Torts—Tort Claims and Defenses in Cases of Detention of Suspected Shoplifters 331

Urban Renewal—The Evolving Concept of "Public Use" ... 341

Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, and Nashville, Tennessee, under the Act of Congress of March 3, 1879.
Published in December, March, May, and October

$5.00 Per Annum $1.80 Per Current Number
EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIX MARCH 1968 NUMBER 2

MEMBERS OF THE LAW JOURNAL BOARD

BAR COMMITTEE

BRUCE C. AULTMAN, *Chairman*
Hattiesburg

L. O. SMITH, JR., *Co-Chairman*
Jackson

EMMETTE P. ALLEN
Brookhaven

MAURICE DANTIN
Columbia

WILL HICKMAN
Oxford

WILLIAM A. LOMAX
Grenada

FRANK T. MOORE, JR.
Jackson

EARL T. THOMAS
Jackson

MISSISSIPPI STATE BAR
1967-68

OFFICERS

N. W. OVERSTREET, JR., of Jackson.....President
WILLIAM C. KEADY of Greenville.....First Vice-President
ED CONNELL of Clarksdale.....Second Vice-President
GEORGE VAN ZANT of Jackson.....Executive Director and Secretary-Treasurer

COMMISSIONERS

W. P. MITCHELL.....Tupelo
HOLLIS C. THOMPSON.....Gulfport
HARRY L. CASE, JR.....University
JOHN J. FRAISER, JR.....Greenwood
BURRIS O. SMITH.....Louisville
FRANK W. WALDEN.....Natchez
RUFUS CREEKMORE.....Jackson
WILLIAM H. JOHNSON.....Decatur
WILLIAM W. RAMSEY.....Vicksburg
THOMAS R. JONES.....Meridian
WILLIAM P. DULANEY.....Tunica
LESTER CLARK.....Hattiesburg
JERRY L. YEAGER.....Raleigh
WILLIAM A. WILTSHIRE...McComb
JAMES SEBE DALE, JR.....Columbia
LEROY R. KENNEDAY.....Macon
JOHN W. WHITTEN, JR.....Sumner
STEWART J. GILCHRIST.....Laurel
FRANK J. HAMMOND, JR.....Moss Point

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIX MARCH 1968 NUMBER 2

THE LAW JOURNAL EDITORIAL BOARD

R. MIZE CONNER
Editor-in-Chief

JON P. THAMES
Assistant Editor

SAMUEL ALLEN LACKEY
Article Editor

JIMMIE B. REYNOLDS, JR.
Note Editor

GEORGE L. BOUNDS, JR.
Comment Editor

GUY W. MITCHELL, III
WILLIAM H. McMULLEN
Research Editors

S. WAYNE EASTERLING
Special Projects Editor

L. CARL HAGWOOD
Index and Review Editor

JAMES K. DOSSETT, JR.
Business Manager

JOHN R. BRADLEY, JR.
Faculty Advisor

THE LAW JOURNAL STAFF

Don Barrett
Eugene M. Bogen
David Clark
Sammy Davis
Eugene L. Fair
Gary L. Geeslin
Larry Thompson
L. V. Watkins

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

Digitized by the Internet Archive
in 2012 with funding from
LYRASIS Members and Sloan Foundation

http://archive.org/details/mississippilawjo39jame

Mississippi Law Journal

VOLUME XXXIX MARCH 1968 NUMBER 2

APPLICATION OF DATA PROCESSING TECHNIQUES TO THE UNIFORM COMMERCIAL CODE FILING SYSTEM: A MODERN PROPOSAL FOR MISSISSIPPI

*James L. Robertson**

I. Introduction

Without question one of the most critical aspects of the new Uniform Commercial Code in Mississippi will be the Code system of notice filing.[1] Unless a security interest [2] is perfected by possession,[3] as in the case of the traditional pledge, the Code requires that a financing statement [4] be filed before the secured party has any protection against third persons. Since filing is so important under the Code, it should be hoped that a simple set of rules concerning the place of filing would be provided, with which secured parties could easily comply and, therefore, perfect [5] their security interests without undue risk of error. Since the

* B.A., Univ. of Miss., 1962; LL.B., Harvard Law School, 1965; Associate, Keady, Campbell & DeLong, Greenville, Mississippi. The author wishes to acknowledge the assistance of Mr. Charles P. Boyd, computer systems engineer, for providing technical assistance. In addition the author wishes to thank the numerous attorneys and bankers in Greenville who furnished helpful comments.

[1] *See*, Miss. Code Ann. §§ 41A:9-401-9-406 (1956) as amended. All further citations to the Mississippi Text of the Uniform Commercial Code will omit the prefix § 41A and will use the regular UCC section numbers. All citations to UCC sections, unless otherwise indicated, are making a reference to the Code as adopted in Mississippi. Where the Official Text is referred to in this article, the 1962 Official Text is contemplated.

[2] The term "security interest" is defined in § 1-201(37). This article will employ Code terminology throughout. Footnotes to the appropriate Code section will be given where important terms or concepts are used.

[3] § 9-305.

[4] There is no official Code definition of a "financing statement." In substance, it is a formal written notice that the secured party [§ 9-105(1) (i)]may have a security interest in the debtor's [§ 9-105(1) (d)] collateral [§ 9-105(1) (c)]. This definition is derived from § 9-402. See § 9-402(4).

[5] The concept of "perfecting" a security interest is described in § 9-303 considered together with § 9-302.

whole purpose of filing is to give public notice that the secured party may have a security interest in the debtor's property, it would also seem desirable that the filing records should be kept so that the public has easy access to them.

The Code rules concerning the place of filing, as enacted by the Mississippi Legislature,[6] fail to accomplish these purposes. Unfortunately, these rules add more confusion than simplicity to the filing procedure. As a result of almost certain overcautiousness, many secured parties (and particularly their lawyers) operating under the Code may be expected to adopt a practice of filing in every place where a court might conceivable hold that they should have filed. Such needless filings will add to the confusion which will already exist under the filing provisions of the Code, while also adding to the costs incurred by secured parties and their debtors resulting from filing, not to mention the costs to the State of Mississippi and to the local counties for operating filing offices equipped to receive and preserve the numerous needless filings.

The purpose of this article is to consider a rather far-reaching proposal which might eliminate this anticipated "mess" while, at the same time, satisfying all of the policy considerations surrounding public notice filing. First, the filing provisions as they now exist in the Mississippi Uniform Commercial Code and a few of the problem areas in these rules will be discussed briefly. Then will follow an explanation of how, through the use of electronic data storage and retrieval equipment, these and many more problems could be completely eliminated. It is submitted that the savings in time and expense and manpower, together with the combined advantages of certainty and convenience in Code filings, will leave no doubt that the project would be well worth the costs, which, if all of the necessary equipment were purchased new and used only for this purpose, would be substantial.

II. Filing Requirements Under Official Text and Mississippi Text of Uniform Commercial Code

Basic to any discussion of the Code's filing requirements is an understanding of the concept of notice filing.[7] Under pre-code chattel

---

[6] §9-401(1).

[7] 1 Coogan, Hogan and Vagts, *Secured Transactions Under the Uniform Commercial Code* § 6.01[3] (1967); 1 Gilmore, *Security Interests In Personal Property* § 15.3 (1965). Notice filing is really nothing new in Mississippi. We have used it for years under our Uniform Trust Receipts Act, Miss. Code Ann. §§ 5080-01 to -23 (Supp. 1966), and our Assignment of Accounts Receivable Act, Miss. Code Ann. §§ 243-01 to -10 (1956).

security law in Mississippi the entire security document was filed and recorded in the office of the Chancery Clerk of the proper county.[8] Under the Code the full document, known as a security agreement,[9] need not be filed. Rather, secured parties will file a half-page form known as a financing statement.[10] This form will contain the name and address of the debtor, the name and address of the secured party, a general description of the collateral by types or items, and the signatures of the parties.[11] The financing statement may be filed either before or after the underlying secured transaction is completed.[12] Its presence in the filing records "indicates merely that the secured party who has filed may have a security interest in the collateral described."[13] If a party searching the filing records finds a financing statement outstanding against his prospective debtor, he must then contact one of the parties to obtain additional details.

The filing of financing statements under the Code may be placed in four categories, depending upon the place (or places) where the filing is made. First, the most familiar to Mississippians, is "local filing." This type of filing refers to a filing in the office of the Chancery Clerk of the county in which the debtor lives, or if the debtor lives outside of Mississippi, then in the office of the Chancery Clerk of the county in which the collateral is kept.[14] Second, where the collateral is fixtures, the financing statement must be filed with the Chancery Clerk of the county in which the real estate to which the fixture is attached is located. This is known

---

[8] *See, e.g.*, MISS. CODE ANN. §§ 863, 868, 884, 243-02, 382-14 and 5080-13.

[9] § 9-105(1) (h). *See also* § 9-203(1) (b) (1956). § 9-402(1) authorizes the filing of the security agreement in lieu of a financing statement.

[10] These forms are reproduced in a manual published by the office of the Secretary of State on November 1, 1967 at pages 43-49 and in a manual published by the Mississippi Bankers Association in November, 1967, at pages 161-165. The text of the Bank Manual is an extremely helpful guide to Article 9 and is written by Conwell S. Sykes, President, Commercial National Bank of Greenville.

[11] § 9-402(1).

[12] *Id.*

[13] § 9-402, Comment 2. Because of the importance of the first-to-file priority rule of § 9-312(5) (a), secured parties may often file before any security interest has been created. Throughout the Official Text of the Uniform Commercial Code, Comments on each section are included. These Comments have been prepared and approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. These Comments set forth the purpose of the various provisions of the Code: "[T]o aid in uniform construction . . . to aid in viewing of the Act as an integrated whole, and to safeguard against misconstruction." See Comment to Title of Uniform Commercial Code, Official 1962 Text. Lawyers will find these Comments most helpful in dealing with the Code, and it is recommended that all lawyers who expect to be concerned with the code have access to the Comments.

[14] § 9-401(1) (a).

as "real estate filing."[15] Third, there is "central filing," the filing of the financing statement only with the office of the Secretary of State.[16] Fourth, where the Code requires a filing both with the Secretary of State and with a county Chancery Clerk, the practice is known as "dual filing."[17]

The Official Text of the Uniform Commercial Code contains three alternatives for Subsection (1) of § 9-401, the section which designates the place of filing. The first alternative provides for maximum central filing, with only security interests in fixtures to be perfected by non-central filing.[18] The second alternative provides for local filing where the collateral is consumer goods,[19] or farm-related collateral, real estate filing where the collateral is fixtures, and central filing in all other cases. The third alternative provides for maximum local filing. It is identical to the second alternative except that it requires the dual filing in all cases in which the debtor has a place of business in only one county. With only one minor variation Mississippi has adopted the third alternative.[20]

The Mississippi version of § 9-401(1) is by far the most complicated of the three alternatives. Although its rules are comprehensible and clearly represent an improvement over pre-code chattel recordation rules, there exists far more chance for confusion under the Mississippi version than under the other two. Much of this confusion is created by the dual filing requirement. The rules making the place of filing turn on the debtor's residence, his place of business, the nature of his business, and

---

[15] § 9-401(1) (b); See also, MISS. CODE ANN. § 867 (1956).

[16] § 9-401(1) (c).

[17] *Id.* After Mississippi has had a few years of experience under the Code, it is bound to occur to more than just a few people that dual filing is rather unnecessary. No prospective secured party (nor his attorney) is going to rely on the Chancery Clerk's records when the collateral to be taken might fall in the catch-all category of § 9-401(1) (c). For example, where inventory [§ 9-109(4)] is collateral, persons searching the filing records will undoubtedly adopt the practice of checking only with the Secretary of State, since any financing statement covering inventory will be filed there, whether it is filed anywhere else or not. Further, any security interest in a prospective debtor's inventory which has not been covered by a centrally filed financing statement could not possibly be perfected. Thus, the local filing becomes a bit superfluous, unless it serves either to satisfy the aesthetic senses of those constitutionally opposed to central filing, or to remain as a source of revenue for Chancery Clerks. Surely, within a few years, even if the proposal made herein is not adopted, the legislature will see fit to eliminate dual filing and, in effect, adopt the second alternative in § 9-401(1) in the Official Text of the Code.

[18] In view of the proposal here made, the first alternative should be adopted in Mississippi.

[19] § 9-109(1).

[20] § 9-401(1).

the use to which the collateral is to be put will also be traps for the unwary. All of these sources of trouble will be discussed later.

Mississippi, of course, is not the only state which has had to struggle with the conflicting policies of the three different versions of § 9-401 (1). A quick glance at what other states have done to the Code's place-of-filing rules is sufficient to satisfy one that Mississippi probably is no worse off than anybody else.[21] This is so because heretofore no one has been able to devise a filing system which would serve the apparently incompatible policies of certainty and convenience—*certainty* that the filing is made in the proper place and that one making a records research is looking in the proper place, and the *convenience* of having the filing records accessible in the local communities. The draftsmen of the Code took the easy way out by including three alternatives in the Official Text, and then slipping out the back door without attempting "to resolve the controversy between the advocates of a completely centralized statewide filing system and those of a large degree of local autonomy."[22] The draftsmen passed the buck with the advice that "local considerations of policy will determine the choice to be made."[23] In view of the fact that the draftsmen were not a bit bashful about wiping out the entire body of substantive chattel security law which had existed for many decades, their abstention on the place of filing rules becomes rather interesting. Perhaps they anticipated that more of an effort would be made to preserve the local clerk's filing office than would be expended in the defense of the chattel deed of trust.

As has been the case in most rural states, Mississippi adopted the maximum local filing alternative for § 9-401(1).[24] Under its rules all security interests in consumer goods must be perfected by local filing. Further, a financing statement perfecting a security interest in equipment[25] used in farming operations, or farm products,[26] or accounts,[27] contract rights[28] or general intangibles[29] arising from or relating to the sale of farm products by a farmer must be filed locally.[30] Security interests in fixtures must be perfected by filing in the office of the Chancery

---

[21] *E.g.*, Rhode Island, New Mexico, and Georgia.

[22] § 9-401, Comment 1.

[23] *Id.*

[24] Rural states Nevada, Kentucky, and Vermont have provided for maximum local filing.

[25] § 9-109(2).

[26] § 9-109(3).

[27] § 9-106.

[28] *Id.*

[29] *Id.*

[30] § 9-401 (1)(a).

Clerk where a real estate mortgage covering the land involved would be filed.[31] In all other cases (inventory,[32] accounts, non-farm equipment, chattel paper,[33] documents,[34] contract rights, general rights, general intangibles, etc.) central filing is required although if the debtor has a place of business in only one county, a financing statement must be filed both centrally and locally.[35]

III. Problem Areas Under Mississippi Code Place-of-Filing Rules

The following are a representative sampling of the types of problems which from time to time will no doubt arise under the place-of-filing rules of the Uniform Commercial Code as adopted in Mississippi. The proposal made herein would eliminate all of these problem areas in their entirety. At the outset of this discussion it should be made clear that the problems presented in the remainder of this section of this article are by no means beyond solution. The purpose for the inclusion of this discussion is to point out the author's belief that it is completely unnecessary that these problem areas exist. As they are now written, the Code filing rules in Mississippi constitute merely a trap for the unwary. As will be explained later, there are no policy considerations served by the present rules which could not be served more efficiently under the filing system proposed herein.

A. Filing Controlled by Classification of Collateral

One likely source of trouble under the Code filing system is found in the classifications of "goods" used as collateral.[36] Under the Code goods are broken down into four mutually exclusive classifications: (1) consumer goods, (2) equipment, (3) farm products, and (4) inventory.[37] These classifications are extremely important for many reasons, one of the most important of which concerns the place where a filing must be made to perfect a security interest in such goods.[38] Our concern for the

---

[31] § 9-401(1)(b).

[32] § 9-109(4).

[33] § 9-105(1)(b).

[34] § 1-201(15); § 9-105(1)(e).

[35] § 9-401(1)(c). For an excellent summary of the filing rules under the Mississippi Code, See Sykes, *Bank Manual on Articles Four and Nine, Mississippi Uniform Commercial Code* 118-119 (1967).

[36] § 9-105(1)(f) and § 9-109.

[37] § 9-109.

[38] *See* § 9-109; § 9-401, Comment 1.

present is the inevitable fact that parties seeking to perfect a security interest by filing will be misled by these classifications under the filing system adopted in the Mississippi Code.

The classification of "equipment" is a good example of this problem. The definition found in § 9-109(2) considers equipment as equipment, without any sub-categories. However, a careful study of the Code will reveal that there are really two kinds of equipment—farm equipment [39] and non-farm equipment [40]—and that the differences between the two are most important for filing purposes. For example, if Bank A is making Fred Farmer a loan and wishes to perfect a security interest in Farmer's equipment, Bank A must file a financing statement in the office of the Chancery Clerk in the county of Farmer's residence.[41] However, if Bank A wishes to make XYZ Construction Company (a company having a place of business in at least two counties) a loan on its equipment, the security interest must be perfected by filing with the Secretary of State.[42] And, if Bank A wishes to make the same deal with PQR Construction Company, which has a place of business in only one county in the state, the Bank must file a financing statement with both the Secretary of State and with the Chancery Clerk in the county of such place of business.[43] In short, the determination under § 9-109(2) that the goods are equipment tells the secured party nothing about where he ought to file to perfect his security interest.

To make the example more pointed consider the case of a combine. If the combine is used by a farmer in farming operations, the financing statement must be filed with the Chancery Clerk in the county of the debtor's residence.[44] However, if it is used by a person who is not a farmer but who uses the combine to do custom work for other farmers, it is entirely plausible to conclude that the combine then becomes non-farm equipment, requiring a filing with the Secretary of State, as well as with the Chancery Clerk.[45]

The automobile is another similar example. Ordinarily, the automobile will be consumer goods, a security interest in which will be perfected by local filing. However, it may well be equipment when it is a "com-

---

[39] Where collateral is farm equipment, filing is controlled by § 9-401(1)(a) and § 9-302(1)(c).

[40] Where collateral is non-farm equipment, filing is controlled by § 9-401(1)(c).

[41] § 9-401(1)(a).

[42] § 9-401(1)(c).

[43] *Id.*

[44] § 9-401(1)(a).

[45] § 9-401(1)(c). By analogy, note that cotton is farm products while in the hands of a farmer, but it becomes inventory when placed in a warehouse owned by one other than the farmer.

pany car," thus requiring dual filing if the company has a place of business in only one county. Needless to say, there will be many marginal cases (the automobile of a salesman, a doctor, etc.) which will result in filing as though the automobile were both consumer goods and equipment. This will be particularly true in cases where an individual has his car owned by the company for income tax purposes, but the actual use to which the car is put is largely personal. The Code's draftsmen contemplated this type of problem and have recommended that "in borderline cases . . . the principal use to which the property is put should be considered as determinative."[46] The problem is that the principal use of the collateral is not always readily determinable.

This same type of example could be made even more extreme by pointing out that certain goods, *i.e.*, a horse, could conceivably, under proper circumstances, fit into every type classification found in Article 9. A horse would be consumer goods if owned by a person who used the horse for private riding and pleasure purposes. The horse would be farm equipment if used on a farm to help work the land. The horse would probably be non-farm equipment on a dude ranch. The horse would be farm products if raised by a rancher as a part of a herd. The horse would be inventory if held for sale or lease by a business. And, of course, at different stages in his life, the same horse could fit all categories.[47]

B. Problems Arising Where a Factor Which Controlled Original Filing Changes

Since the place of filing is controlled by a rather delicate balance of the classification of the collateral, the residence of the debtor, and the use to which the debtor puts the collateral, it is entirely possible that a change of any of these factors may result in a change in the filing requirements for the particular item of collateral. The Code meets this problem by providing that a filing made in the proper place at the time of the filing does not become ineffective because some factor changes which, had it existed when the original filing was made, would have required filing in a different place.[48] This, however, is likely to be of little consolation to the prospective lender who does not know what the former fact was and thus searches the filing records in the wrong place.

---

[46] § 9-109, Comment 2.

[47] Query: What category would a $100,000 race horse fit in and then where would one file to perfect a security interest in such a race horse.

[48] § 9-401(3).

Consider the case of a farmer who has granted a security interest in his farm equipment to secure a loan from Bank A. Under § 9-401(1)(a) the filing was made in Washington County where the farmer then lived. Two years later the farmer buys new farm lands in Sharkey County and moves his home and his equipment to Sharkey County, and at the beginning of the planting season the farmer obtains a production loan from Bank B, giving as security a security interest in the crops and all farm equipment. If Bank B is not advised that the farmer formerly lived in Washington County, it may well check only the filing records in the office of the Chancery Clerk of Sharkey County. If it does so, it will fail to obtain notice of the prior security interest in the farmer's farm equipment. Under such circumstances the farmer's insolvency might be a real disaster for Bank B.

A similar problem could develop in the case of a corporation, doing business in Washington County and Sunflower County. Assume that the corporation obtains an inventory and receivables loan, with the secured party filing only in the office of the Secretary of State under § 9-401(1)(c). Assume further that this is the normal type of revolving loan arrangement with periodic advances and repayments and that the security agreement is effective for a full five year term. Two years later the debtor closes its store in Sunflower County and moves all of the inventory to the store in Washington County. A year later the debtor seeks financing from a second lender without disclosing the fact of the first arrangement. If the second lender has no knowledge of the fact that the debtor once had a place of business in Sunflower County (or, as would more likely be the case, if he is not aware that it makes any difference) he may well rely on a trip to the Chancery Clerk's office in Washington County to see if there are any financing statements outstanding against the debtor. If he does this and fails to check with the Secretary of State, he may well advance substantial funds against collateral already covered by an earlier perfected security interest held by the first secured party. In the event of the debtor's insolvency, the second lender will share in the debtor's remains only after the first secured party has satisfied its debt.[49]

C. Where to File When Debtor is a Partnership or Corporation

If the debtor is a partnership or corporation, a number of filing problems may arise. Consider the case of a farming partnership where three partners, one a resident of Washington County, one a resident of

[49] The problem discussed in this section might be particularly troublesome in view of the six-year statute of limitations on promissory notes.

Sunflower County, and one a resident of Humphreys County, conduct a farming operation in Sunflower County. The partners living in Washington and Humphreys Counties have made their contributions in capital assets, while the partner living in Sunflower County actually runs the operation. They wish to obtain a crop production loan at the beginning of the planting year. An entirely plausible argument may be made that the Bank making the loan should file only in Sunflower County. However, it may be expected that most lenders in this situation would file in all three counties.[50]

Where a three-man partnership operates a retail business, the partners living in three separate counties, an inventory loan under § 9-401(1)(c) ought to require dual filing, with the Secretary of State and with the office of the Chancery Clerk where the partnership did business. However, it may be safely predicted that, in such situations, we may expect the secured party to make filings in the counties of the residence of all of the partners, as well as with the Secretary of State.

A farming corporation creates many problems. The Code requires that security interests granted by such debtors be perfected by filing in the office of the Chancery Clerk of the county of the debtor's residence. But where is the residence of such a corporation which owns land in three different counties? The county where the "principal place of business" is located?[51] The county where the debtor owns the most land? If such a farm corporation debtor grants a security interest in its equipment, the secured party will probably wind up filing everywhere in sight.

D. What is "A Place of Business"?

Another problem likely to be faced when deciding where to file may be found in the concept of "a place of business" as found in § 9-401(1)(c). Does "a place of business" mean a physical facility out of which the debtor does business? Or, does the phrase refer to a concept similar to "doing business" as this latter concept is often used for jurisdictional purposes?[52] A debtor may well have only one physical facility out of which it does business, that located in Jones County. However, he may send salesmen into several surrounding counties every day. Certainly a plausible argument can be made that the debtor has a place of business (a concept not to be confused with "principal place of busi-

---

[50] See Sykes, *Supra,* Note 35, p. 52.

[51] Banker will probably assume that the corporate debtor's residence is the location of its principal place of business. See Sykes, *Supra,* Note 35, p. 48.

[52] The "doing business" concept in Mississippi is defined and discussed in *Lee v. Memphis Publishing Co.,* 195 Miss. 264, 14 So. 2d 351 (1943).

ness") in more than one county, thus requiring a filing only in the office of the Secretary of State. This is simply another example of the sort of situation in which, with two possible interpretations that might be given to the Code's filing rules, secured parties will undoubtedly follow the interpretation which leads to the maximum number of filings.

E. Problems in Counties with Two Judicial Districts

The fact that nine Mississippi counties have two judicial districts[53] may give rise to some confusion. Generally, if a debtor has a place of business in only one county, filings should be made both with the Secretary of State and with the Chancery Clerk of the county involved.[54] But what if the debtor in one of these nine counties has a place of business in both judicial districts of the county, but in no other county? Must filings be made in both judicial districts? Or only one? And, if only one, does it matter which one? Presumably, since the debtor has no place of business outside the particular county, it will also be necessary to file with the Secretary of State under § 9-401(1)(c). But might it not also be argued that each judicial district should be treated as a separate county for filing purposes. If this were the case there would be only one filing required: with the Secretary of State, even though the debtor did no business outside the one county.[55]

It should be made clear at this point that the problem areas discussed above are not so difficult that they are without solution. Rather, a careful consideration of all of the facts and circumstances in a given secured transaction should enable anybody who has a basic working knowledge of Article 9 to file so that the desired security interest will be perfected. The objection being made here is against the necessity for this "careful consideration of all of the facts and circumstances." Section 9-401(1), as it has been enacted in Mississippi, requires the secured party and his counsel, depending upon the substance of the transaction involved, to determine the debtor's residence, his place of business, the nature of his business, the location of the collateral, and the use of the collateral before the proper place (or places) to file can

---

[53] The counties with two judicial districts are Bolivar, Carroll, Chickasaw, Hinds, Jasper, Jones, Panola, Tallahatchie, and Yalobusha. Miss. Code Ann. §§ 1216-1226.95 (1956).

[54] § 9-401(1)(c).

[55] A proposed amendment to the Code has been offered in the legislature to provide that, in counties with two judicial districts, each judicial district will be treated as a separate county for filing purposes. This amendment, introduced in the legislature as House Bill No. 282, which will be codified as § 9-401(5) is expected to become law shortly. Compare Miss. Code Ann. § 886 (1956).

be determined. In each transaction the secured party has to sit down and decide all of these questions before he will know where to file. He must then fit his answers into the precise but tedious lagnuage of § 9-401(1). By enacting § 9-401(1). in its present form and thus requiring all of these gyrations before each filing, it is submitted that the legislature has needlessly complicated a vital function under Article 9.

IV. Actual Cases of Erroneous Filing Under the Uniform Commercial Code

In response to the above it might be argued that the problem areas presented are simply hypothetical cases which may never occur under the Uniform Commercial Code. It is submitted that Mississippi lenders will be confronted by each of the above hypothetical fact situations, although hopefully not too often, and that each time one of these situations arises there is a substantial possibility that an erroneous filing will be made.

Although the Code is still relatively new everywhere—it was first enacted in Pennsylvania in 1954—there have been at least four reported cases that should be mentioned here. In each of these cases a good faith, but erroneous, filing by the secured party resulted in the invalidation of a security interest by a bankruptcy trustee on the grounds that the security interest, because of the improper filing, was unperfected. In *In The Matter of Luckenbill*[56] the bankrupt debtors were engaged in the butchering and retail grocery business, having two places of business in a single county in Pennsylvania. The debtors purchased equipment for their two stores and executed what were formerly known as retail installment sales contracts in favor of the seller, and the contracts were subsequently assigned to a bank. Although the filing requirements of the Pennsylvania Code, (identical to those in Mississippi) called for dual filing, the bank filed only locally. The bankruptcy trustee attacked the bank's security interest on the ground that it had not been fully perfected under state law as of the date of the filing of the bankruptcy petition. The court upheld the trustee's contention over the argument of the secured party that it had acted in good faith in filing only in the local clerk's office.

A similar situation may be found in *In the matter of Babcock Box Company.*[57] There the secured party sold machinery to a debtor having a place of business in only one town in the state. Financing statements

[56] 156 F. Supp. 129 (E.D. Pa., 1957).
[57] 200 F. Supp. 80 (D. Mass., 1961).

were filed with the Secretary of State and with the Register of Deeds of the proper county. The Massachusetts Code, however, required in this situation a filing with the town clerk rather than with a county filing office. The secured party had not filed with the town clerk and thus lost his collateral to the bankruptcy trustee.

The next of these cases, *In the Matter of Lux's Superette, Incorporated,*[58] also arose out of Pennsylvania. There the debtors purchased equipment for their store on a conditional sales contract. Since they did business in only one county in the state, the Pennsylvania Code required dual filing. The secured party, however, acting in good faith but unfortunately in ignorance of the law, filed locally, but failed to file with the Secretary of the Commonwealth of Pennsylvania. Predictably, the District Court upheld the bankruptcy trustee's attack upon the secured party's security interest on the ground that the failure to file centrally left the security interest unperfected.

The fourth case is *In the Matter of Park Corrugated Box Corporation.*[59] In that case the debtor had purchased a machine to be used in the manufacture of corrugated boxes. The secured party mistakenly considered the machine as a fixture and filed with the local clerk's office. In bankruptcy the trustee attacked the security interest and claimed that the machine was actually equipment and that under the New Jersey Code central filing was required in order to perfect the security interest. The District Court, after finding that the collateral was equipment rather than fixtures, held that the security interest had not been perfected because of the failure to file with the Secretary of State. Of course, under the first alternative version of § 9-401(1) found in the 1962 Official Text, the problem in this case could still occur. The answer to the secured party's problem in this situation should be found by his learning with more accuracy the difference between fixtures and equipment, a task in which, regrettably, not even data processing can assist him.

The four cases just cited do not represent problems that *might* arise under the Code. They represent actual cases which have arisen and in which secured parties have lost their security because of incorrect filings. They represent cases in which the secured parties knew that filing was necessary, but simply failed to file in compliance with the Code's requirements. Under the law the four decisions are all sound. It is our purpose here, however, to protest against the law, specifically § 9-401(1), which makes these decisions possible. It is submitted that the secured parties who lost in the four cases above, except, of course, in the *Park*

[58] 206 F. Supp. 368 (E.D. Pa., 1962).

[59] 249 F. Supp. 56 (D.N.J., 1966).

Corrugated Box Corporation case, could have perfected their security interests properly and thus avoided the consequences which they suffered if they had been filing under the proposal made here.

V. Application of Electronic Data Processing to Place-of-Filing Rules Under Mississippi Code

In order to simplify, clarify and modernize the place-of-filing rules under the Mississippi Uniform Commercial Code, it is recommended that the techniques and technology of electronic data processing be brought into play.[60] This would require first the adoption of the first alternative version of § 9-401 contained in the Official Text of the Code. If this were done, § 9-401(1) would read as follows:

> The proper place to file in order to perfect a security interest is as follows:
> (a) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded;
> (b) in all other cases, in the office of the Secretary of State.

Under the first alternative version of the place of filing rules, we would have total central filing in Mississippi, except in the case of fixtures.[61] There would be no local filing, as that concept is embodied in the present statute.

Electronic data processing comes into the picture in the following manner. For each secured transaction and financing arrangement under the Code, the secured party would file one financing statement with the Secretary of State.[62] The data and information on this statement would then be fed into a central data processing machine by employees of the office of the Secretary of State. The financing statement itself would then be placed in the files just as it would without the use of data processing.

---

[60] The author credits the idea for using data processing in the Code filing system to Professor Grant Gilmore. See 1 Gilmore, *Security Interests In Personal Property* § 18.23 at 532 (1965).

[61] The following states have adopted in substance the first alternative version of § 9-401(1): Connecticut, Delaware, and Utah.

[62] It is recommended that where the debtor is a partnership, a separate financing statement be filed under the name of each partner. Also, where either a sole proprietor or a partnership does business under a trade name unrelated to the name of the proprietor or any of the partners, a separate filing should be made under the trade name. The full details concerning the legal status of the debtor in such cases should be briefly spelled out in an extension sheet attached to the financing statement. (See Forms UCC-1 and UCC-E as approved by the Secretary of State.)

Transmitting and retrieving data processing machines would be stationed in the office of the Chancery Clerk of each county in the state (and probably in each judicial district of those counties having more than one judicial district). Whenever anyone desired to make a records search to determine whether or not there were any financing statements outstanding against a prospective debtor, that person would go to the office of the Chancery Clerk in the county in which he was situated[63] and make the request that the electronic brain check the name or names given. The local transmitter would then send the request, or the name to be checked, to the central data storage center in the office of the Secretary of State in Jackson. Within microseconds after the request was received, the central unit would reply with all of the details of any financing statement on file against the particular debtor.

The manner in which UCC filings would actually take place under the proposal here made, of course, is not so simple as the above description would indicate. We will here explain in detail exactly what would be done under central filing via data processing. The forms approved by the Secretary of State[64] could still be used.

These are:

(1) Form UCC-1—Financing Statement;[65]

(2) Form UCC-3—Statements of Continuation, Partial Release, Assignment, Amendment and Termination;

(3) Form UCC-E—Extension Sheet;

(4) Form UCC 11—Request for Information or Copies.

The financing statement (UCC-1) used in Mississippi contains spaces for the inclusion of the following information:

(1) Debtor's name and address;[66]
(2) Secured party's name and address;[67]
(3) Maturity date (if any);
(4) A description of the types or items of collateral[68] covered;
(5) Assignee of secured party and address;

---

[63] Under this proposal it would not make one bit of difference which Chancery Clerk's office were selected.

[64] See Sykes, *Supra*, Note 35, pp. 161-165. Under House Bill No. 287, to be codified as § 9-409 of the Mississippi Uniform Commercial Code, the Secretary of State would be given the power to prescribe and adopt the types of forms for all filings to be made in his and other filing offices of this state.

[65] Since dual filing would be eliminated under this proposal, UCC-2, which is nothing more than a duplicate of UCC-1, would be eliminated.

[66] § 9-402(1) and (3).

[67] *Id.*

[68] § 9-402(1) and (3); § 9-110.

(6) Whether or not the collateral is already subject to a security interest in another jurisdiction when it was brought into the state;[69]

(7) Whether or not the collateral is proceeds of the original collateral described in which a security interest was perfected;[70]

(8) Whether or not proceeds of the collateral are also covered;[71]

(9) Whether or not products of the collateral are also covered;[72]

(10) The number of additional sheets which are presented;

(11) The office or offices with which the financing statement is filed;

(12) The signature of the debtor;[73]

(13) The signature of the secured party.[74]

Unless the lender elects to file the security agreement itself,[75] UCC-1 and the information just itemized would be fed into the central data storage unit in the office of the Secretary of State. If additional data for some reason needs to be included (as where the debtor is a partnership), it could very easily be included in the same financing statement. In such case, secured parties would use Form UCC-E, the extension sheet referred to above. Form UCC-E must also be signed by both parties.

In order to make a request for information, the parties will be able to continue to use UCC-11 under the proposal here. The party making the request would simply check the box marked "Information Request" on UCC-11 and state the time as of which he would like for the Chancery Clerk to make the information request effective, sign the form, and deliver it (by mail or in person) to the nearest Chancery Clerk. Employees of the office of the Chancery Clerk would then make the request of the central storage unit. This would be done through a device quite similar to a newspaper teletype transmitting and receiving machine. The employee of the Chancery Clerk handling this matter would type the request as it was being fed into the central data storage unit. In this manner the party making the request could be absolutely certain

---

[69] § 9-103(3); § 9-402(2)(a).

[70] § 9-306(3); § 9-402(2)(b).

[71] § 9-203(1)(b); § 9-402(3)4; and § 9-306(2).

[72] § 9-315(1)(b); § 9-402(3)4.

[73] § 9-402(1) and § 9-402(3)4.

[74] *Id.*

[75] § 9-402(1) permits filing of the security agreement in lieu of financing statement if it complies with the requirements of a financing statement. This practice is dangerous and, where the secured party forgets to sign, it may be disastrous.

that the correct request was made of the central storage unit. The central unit would previously have been programmed to respond with the following information concerning the party whose name has been submitted: the file number, date and hour of filing, and name and address of secured party of all outstanding financing statements. If such information were received, the secured party could then, while still in the office of the Chancery Clerk, fill out the copy request portion of Form UCC-11 and again, within a matter of seconds have the information which he desired.[76]

Statements of continuation, termination, assignment, amendment, and partial release would also be handled in a similar manner, Form UCC-3 again being completely adequate. Where UCC-3 is used as a continuation statement, the central storage unit would be programmed to reply to a request only that the financing statement remains effective and that it has been continued. Where UCC-3 were used as a termination statement, unless the Secretary of State as a matter of policy decides otherwise, it would simply have the effect of clearing the financing statement from the filing records.[77]

VI. Technological Feature of UCC Filings by Data Processing

This section of this article, in which we will attempt to outline briefly the mechanical and technological aspects of our proposal, will be difficult in two respects. First, the author is a lawyer, not an electrical

[76] Logically, there is no reason why this procedure could not be shortened even more by the elimination of the Information Request. If desired, it would be entirely feasible for the party making the records search to furnish the Chancery Clerk only the name of the debtor to be checked. The central data storage unit could easily be programmed to respond to the name alone with the complete details of any financing statements on file. Parties making a records search under this procedure would probably find it preferable to furnish the debtor's address along with his name, since it is quite possible that there will at any given time be financing statements outstanding against different debtors who live in different parts of the state but have the same name.

[77] A statement in the Secretary of State's Manual, p. 34, indicates that the financing statement will be removed from the files once a termination statement is filed. Presumably, such financing statements will be preserved, although in separate files. Miss. Code Ann. § 1261.5 (1956) as amended, contains the rules concerning the period of time that public records must be kept before they may be destroyed. This statute applies only to Chancery Clerks, however, and does not mention Uniform Commercial Code financing statements, although chattel mortgage records must be kept for 15 years. Note also the provisions of §§ 4228-21 et seq., which became law in 1966, providing for a state depositary of public records. This new statute says nothing about how long public records must be kept.

engineer. Second, the readers of this article will be people generally unfamiliar with the techniques and terminology of data processing. This discussion is included, however, in the belief that it will add to a fuller understanding and appreciation of the feasibility and practicality of the proposal here made.

A. A Brief Sketch of the Computer Capability, Equipment and Personnel Needed for UCC Filings by Data Processing.

The data processing equipment needed to implement this proposal will have to perform at least three separate and distinct jobs. Each of these jobs, called a program, will refer to a set of steps or procedures that the central processing unit will run through each time it is told to do something by the programmer. These three programs which are essential to this proposal are (1) transaction entry, (2) file maintenance, and (3) data retrieval.

The transaction entry program is basically the process by which information from the Financing Statement, UCC-1, and additional data on the Extension Sheet, UCC-E, are fed into the data storage device. The transaction entry program will be handled in this manner: When the financing statement is received in the office of the Secretary of State, the information contained therein will be put on a data card by the key-punch operator. This will be done in the case of every financing statement as soon as it is received by the Secretary of State, or within a matter of minutes thereafter. When a sufficient number of punched data cards have accumulated (perhaps two or three times a day), all will then be fed into the central processing unit through the card reader. The transaction entry program will then allow the direct access storage device, in which data from previously filed financing statements will already be stored, to be updated to include the new data punched into the cards being run through the card reader.

The file maintenance program will be primarily concerned with keeping the files up-to-date through Statements of Continuation, Termination, Release, Assignment, Amendment, etc. When the UCC-3 is received, the information contained thereon is punched on a card in the same manner described above. It is then fed into the central processing unit where the file maintenance program enables the master file stored in the direct access device to be updated in accordance with the changes on the UCC-3. Once this is done the integrity of the file is such that the data contained therein is completely up-to-date. The file maintenance program will also be used to eliminate all financing statements not renewed after a five year period, and other similar tasks.

The data retrieval program refers basically to the process by which information is obtained by the terminals in the Chancery Clerk's office from the computer center. The request for information, which may or may not be submitted to the Chancery Clerk on UCC-11, is keyed in through the terminal through the control unit located in the computer center and into the central processing unit. The data retrieval program in the central processing unit then searches the master file contained on the direct access storage device and the information about which inquiry has been made is then transmitted to the terminal unit that made the request. The information is received in typed form. The data retrieval program can obtain any information stored on the direct access device instantaneously.

The three programs described above are merely those which are essential to the operation of this system. Other programs could be devised which could enable the public to utilize the data already stored.[78]

From an equipment standpoint, the two required basic units will be the computer center, which presumably will be housed in Jackson under the control of the office of the Secretary of State, and the terminals to be located in offices of the Chancery Clerks of each county (and perhaps each judicial district in the counties with more than one judicial district) in the state.

The equipment which will be needed in the computer center will be the following: (1) a central processing unit in which the stored program will reside; (2) a number of different input-output devices (among these will be a card reader-punch, a printer, magnetic tape devices, and on-line direct access storage devices); and (3) a transmission control unit to handle the terminal capability. All of these input-output devices will be controlled by the central processing unit. The control unit will actually control the terminals which are in the offices of the Chancery Clerks.

In the Chancery Clerks' offices the only equipment needed will be a keyboard typewriter-type terminal. This terminal will be used to type in the information request which will be fed through the control unit at the computer center and into the central processing unit. There the data retrieval program will come into play and in seconds search the direct access files in accordance with the information request received. Once the central processing unit has found the desired information, it will instantly transmit this information back through the control unit to the terminal where this information will be received in typewritten form.

---

[78] *E.g.*, banks could periodically request a list of financing statements outstanding against their debtors.

The remote terminals located in the Chancery Clerks' offices around the state will be linked to the central computer by telephone lines. There are two types of telephone lines: (1) the leased line, or the wats-line, and (2) the switched line going to the regular switchboard network. The wats-line may be either a single direct line or there may be several hook-ups on a given wats-line which would be similar to what is commonly known as a party line. In the latter situation only one of the terminals hooked onto such a wats-line could transmit and receive data at any one time. The choice of which of these three types of hook-ups to the central computer a given county should make could be determined on the basis of the anticipated amount of business to be transacted through the particular clerk's office. Counties such as Harrison, Hinds, Lauderdale and Washington would probably need a direct line all to themselves. On the other hand, counties such as Issaquena, Perry, and Wayne could use the regular telephone switchboard. The number of lines in the system is a factor affecting the total cost of the system. Through proper coordination at the state level, the desirable end of establishing the minimum number of lines necessary to do the job effectively could no doubt be accomplished.

The problem of personnel is not likely to be nearly so difficult as might on first thought be imagined. The personnel employed in the Secretary of State's office who would be dealing with the computer center would be professional data processing specialists. The new computer-operation training programs in the junior and senior colleges of this state can provide ample personnel to man the proposed systems.

The important personnel problems will probably arise in the Chancery Clerk's offices, where the terminal units will be housed. Here it should be emphasized that a regular employee of the office of the Chancery Clerk could be trained to operate the terminal unit. The operation of this equipment would certainly require a degree of know-how and skill, although such capability should not be beyond the reach of an intelligent secretary. The company from which the data processing equipment were purchased would no doubt provide instruction for the persons who would actually be operating the equipment and working with it on a day-to-day basis.

B. Feasibility of UCC Filing by Data Processing at the Present Time

One question quite relevant here is when it would be feasible to put a proposal such as this into actual operation. It is submitted that a target date of January 1, 1969, would be entirely realistic. Of course, the

Legislature would have to amend the current Mississippi UCC filing rules by adopting the first alternative version of § 9-401(1). This could be done in the 1968 Regular Session, with the effective date of such amendment set for January 1, 1969.

One of the reasons for the practicability of this proposal at this time may be found in the plans now being made by other state agencies for the use of data processing equipment. It is anticipated that a data processing system very similar to that outlined above will soon be used for the storage of driver's license data, license tag numbers, and other motor vehicle records. A bill has been introduced in the Legislature which would provide for central title registration to all automobiles and other motor vehicles.[79] If this law were adopted, and if the computer system were established, the central storage unit in Jackson would be the same as that proposed here for the Uniform Commercial Code filing records. Also, the terminals in the Sheriffs' offices under the motor vehicle records system could be the same as that used as the terminals under the proposal herein. This would involve the Chancery Clerks and the Sheriffs getting together on the matter of in whose office the terminal units would be located, as well as on other administrative details. However, this should certainly constitute no obstacle to the system proposed here.

In addition, there has been introduced a bill which would provide for a state central data processing authority which would be in charge of all data processing for all state agencies. If this bill were enacted, the computer equipment purchased would undoubtedly provide for capabilities substantially greater than that contemplated by the limited proposal made here. This equipment under the supervision of the new state agency could easily be used as the central processing unit or computer center in the system described above.

The proposals for a central data processing authority[80] and for using computers for the storage of motor vehicle records are most significant here. If these proposals are approved, and we know of no reason why they should not be, the primary obstacles to the use of data processing for UCC filings should be eliminated. The cost factor and the personnel problems would already be taken care of. There would be no need for the state or counties to purchase new equipment, nor would there be any reason to employ additional personnel.

In any event, the basic equipment needed for this system in the central storage unit in Jackson is already available. The Mississippi Highway Department is currently leasing data processing equipment

[79] House Bill 117 (1968 Reg. Sess.).
[80] S. B. 1695.

which could well be used for storage of UCC filing data. Also, the Mississippi Research and Development Center and Mississippi State University now own the basic computer equipment which has the necessary computer capability for housing a program such as that proposed here. The two new proposals mentioned above—the central data processing authority and the motor vehicle title registration plan, if approved, would greatly facilitate the operation of the UCC filing system. However, even if both be scrapped, the computer capability now available should, with only minor adjustments, be adequate to handle the program here proposed. This being the case, the principal objections to this proposal based upon its cost would seem to have a hollow ring.

VII. Pros and Cons of Central Filing by Data Processing

Historically as noted above, there have been two conflicting policies which have been served by public records filing systems. One of these policies has been that of "certainty." Secured parties, such as banks, loan companies, insurance companies, and other financial institutions, need a method of filing which gives public notice of the existence of a security interest and which also gives to the secured party the certainty that the secured interest is protected against third parties. They need a system simple enough so that compliance with the filing requirements of the law could easily be had, and where the danger of misfiling was slight. On the other hand, the policy of "convenience" must also be served. Public filing systems are maintained in order to give prospective lenders and secured parties the opportunity to determine, prior to entering into a secured transaction, whether or not the prospective debtor has other security interests or security agreements outstanding.[81]

Of substantial importance in considering both of these policies is the fact that quite often secured transactions under the Code will be made without consulting counsel. The large financial institutions operating in the state today handling secured transactions on such a volume basis need a filing system that their lay employees can easily understand. They need the convenience of having to check only one filing office (hopefully close to home) as well as the certainty of knowing that one filing will protect their security interest (assuming, of course, that they have complied with the other provisions of Article 9 with regard to the perfection of a security interest).

---

[81] For a general discussion of these conflicting policies, see 1 Coogan, Hogan and Vagts, *Secured Transactions Under the Uniform Commercial Code*, §§ 6.09 (1967)

Obviously, the requirement of certainty could be best served by a central filing system for the entire state. On the other hand, equally obviously, the requirement of convenience in a rural state such as Mississippi would be best served by having total local filing. The electronic data processing idea proposed above merges these two policies: to provide for maximum certainty for secured parties and maximum convenience of prospective lenders desiring to check the public records. It would eliminate needless double filings, as well as doing away with the necessity for checking more than one filing office. Also, it would not matter in which of the 82 Chancery Clerk's offices in the state the records searcher makes his request. Information on a DeSoto County debtor could be obtained through the office of the Chancery Clerk of Jackson County.

One may predict two primary objections being made to this proposal. First, the Chancery Clerks will be inclined to oppose it for the reason that they may be deprived of certain income which they now have.[82] True, local filing, except in the few cases in which the collateral is fixtures, would be completely eliminated. However, this objection could be simply answered by allowing the Chancery Clerks to charge fees for the service of making requests for copies and information of the central data storage unit. Since this system would probably enable the Chancery Clerk to cut down on his office force, the economics of the proposal, when added to the political value of giving constituents rapid service, should make this proposal rather attractive.

A second objection, which has already been discussed and answered above, will undoubtedly be made because of the expense involved in such a proposal. If there were no computer capability presently available in Mississippi, and if this proposal necessitated the purchase of equipment which could be used for UCC filings and for no other purpose, there is no doubt that such a data processing or computer system would be tremendously expensive. However, keeping in mind what has already been said in the preceding section, two additional thoughts on this anticipated objection might be added. First, such computers would substantially reduce the manpower needs in the office of both the Secretary of State and the Chancery Clerks. The monetary savings resulting from the smaller office force could conceivably offset a large portion of the expense of maintaining the computer system. Second, a fee schedule could be set up, both for filings themselves and for obtaining title information which could be geared to offset a substantial portion of the cost of the system. Such a fee schedule could also be so geared as to allow the Chancery Clerks to derive a certain amount of income from

[82] See 1 Gilmore, *Security Interests in Personal Property* 524 (1965).

the service provided in maintaining the local computer and obtaining the desired information from the data processing center in Jackson. Third, as explained above much existing equipment could be used, and therefore it would not be necessary to purchase data processing equipment the use of which would be limited totally to the Code filing system.

The theory underlying the proposal made in this article is one heard often today. It is based upon the wonders of the electronic brain, which is rapidly revolutionizing the world in which we live. Through the use of data processing in the manner suggested herein, hours upon hours of time will be saved in the geometrically expanding field of secured transactions. Certainty of perfection, insofar as the human being is able to attain it, will be made possible. And we will still have the convenience of a records search in the local Chancery Clerk's office, where all of the other records (except tax and judgment rolls) with respect to the outstanding obligations of debtors are kept.

The Mississippi lawyer in the past has found a search of the chattel records to be extremely tedious, often consuming a number of hours. Under the proposal made here, this records search could be made in a matter of seconds. Bankers, finance companies and other lenders, who either check the records themselves or employ attorneys to do it for them, would also profit from this great savings of time. Through added certainty in the filing process, lenders could practically eliminate the hazard of doing battle with a trustee in bankruptcy somewhere down the line.[83] In the long run, it is entirely conceivable that this added certainty given to lenders might result in a slight reduction of interest rates charged debtors (assuming, of course, that the competition among lending agencies continues apace).

All of this cannot help but promote the general welfare of the entire economy. The additional flexibility and certainty which will be given to secured transactions will add to the wealth of the people, and more specifically to their enjoyment of that wealth. Credit, regardless of the psychological reactions which some may have to it, is an important source of wealth. And Article 9, plus the proposal made here, would doubtless enable lenders to expand their credit practices. There seems little doubt that the consuming public, under the proposed system, would have a greater opportunity for credit, and hence for wealth, and

[83] Certainly, the results in *In The Matter of Luckenbill, supra; In the Matter of Babcock Box Co., supra;* and *In the Matter of Lux's Superette, Inc. supra,* could have been avoided had this system been in effect in Pennsylvania and Massachusetts when these cases arose.

finally for the enjoyment of the benefits of the American economic miracle. It is to this end that the above proposal is made.[84]

IX. Conclusion

Article 9 of the Code was primarily designed "to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty."[85] To a great extent the Mississippi version of Article 9 has accomplished this purpose. We no longer have to worry about the arbitrary and formal distinctions between and among the chattel mortgage, and chattel deed of trust, the conditional sales contract, the factor's lien, the trust receipt, the assignment of accounts receivable, the pledge, and all the rest. These have now been replaced by one relatively simple set of rules designed to ease the creation of security interests in personal property. Yet, while we have eliminated a lot of formal distinctions in the form of secured transactions, we have added equally formal distinctions to the manner of perfecting a security interest by filing. True, the rules of Part 4 of Article 9 are comprehensible. But so were the old rules governing the formation and creation of a secured lien in a debtor's personalty.

The filing rules of Article 9 require a secured party, before entering into a secured transaction, to sit down and think carefully through a number of important questions. Where does the debtor live? Where is the debtor's place of business? What type of business is the debtor engaged in? To what use is the debtor going to put the collateral? Where will the collateral be kept? Depending upon the answers to these and other questions in each specific case, the secured party may be required to file locally with the Chancery Clerk, centrally with the Secretary of State, or dually with both the Chancery Clerk and with the Secretary of State. Again depending upon the facts, if he plans to make a search of the records to determine if there are any financing statements outstanding against the debtor, the secured party must have the answers to all of the questions before he can be certain that he has touched every base.

The proposal here made is totally consistent with the entire philosophy of the Uniform Commercial Code. Commercial transactions, and specifically secured transactions, simply are not things which are handled

---

[84] The thoughts expressed here undoubtedly constitute the positive expression of the "economic reasons" mentioned in § 9-204, Comment 3, for the validation of the after-acquired property clause, and future advance rules in the text of § 9-204.

[85] § 9-101, Comment

on a leisurely person-to-person basis in the 1960's. The demands of a complex and modern commercial system are such that we cannot afford the luxury of the confused filing practices almost certain to result under the Code filing system in Mississippi. It is, therefore, incumbent upon the business community of this State, the financial and lending institutions thereof, the Bar of this State, and, of course, the members of our Legislature, that a proposal similar to that outlined above be instituted as soon as possible.

Secured transactions in Mississippi can be made and perfected under the Code as now enacted with a lot more ease than under the old law. But things would be so much simpler, so much clearer, and so much more modern if the proposal made herein were adopted.[86]

---

[86] The draftsmen of the Uniform Commercial Code were aware of the potential benefits of the use of electronic data processing technology. See 1962 Official Text, § 4-109, Example 3 in Comment; and § 4-204, Comment 4.

TORTS OR WARRANTIES?

*Gibson B. Witherspoon**

I. Basic Concept of Tort Liability

Perhaps the basic reasons behind the different theories of recovery should be considered in your next products liability case. Some twenty-five years ago, Judge Traynor, in a concurring opinion, noted:

> The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the general public, in the base price of the product, as a cost of doing business.[1]

The privity doctrine has long since faded into history. Today the lack of privity is no defense,[2] even if limited to personal property and no personal injuries are involved. Strict, privity-free, tort and warranty products law is extended beyond food, drink and drug cases.[3]

Professor Reed Dickerson ably expresses the recent developments in cases involving defects in manufacture as distinct from cases involving defective designs:

> What we have been calling liability based on fault in the products cases has been for the most part strict liability. The reported cases indicate that the courts have rarely been able to try a bona fide negligence issue in the field of products liability, particularly in the case of food, because the specific facts surrounding the defect are rarely known to either party.[4]

In practice, if the plaintiff can persuade the jury that the defect was in the product when it left the defendant's plant, the inferences are usually drawn in his favor on the theoretical issue of negligence,

---

* Witherspoon & Compton, Meridian, Mississippi; Past President, Mississippi State Bar; Fellow of the American Bar Foundation.

[1] Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

[2] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

[3] *See, e.g.*, Graham v. Bottenfield's Inc., 176 Kan. 68, 269 P.2d 413 (1954); B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir 1959); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

[4] Dickerson, *The Basis of Strict Products Liability*, 17 Bus. Law 157, 166 (1961).

with or without an assist from the doctrine of *res ipsa loquitur* or that of negligence per se.[5]

Our supreme court in a late case[6] adopted the theory of strict liability in tort while holding that the manufacturer is not an insurer and does not have to produce a perfect product. A plaintiff must prove that the defect which resulted in his injury was present when the product left the factory. The late, modern concept in products liability cases is to rely on the common-law principles of strict liability in tort instead of the new concept of implied warranties under the UCC. In a late case Justice Frances held:

> The obligation of the manufacturer thus becomes what in justice it ought to be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The purpose of such liability is to insure that the cost of injuries or damages, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than the injured or damaged persons, who ordinarily are powerless to protect themselves.[7] [Irrespective of contract or a privity relationship, strict liability is conditioned neither by advertising or promotional sales materials including models. "It arises from mere presence of the product on the market."[8]]

The courts seem to characterize the strict liability in torts as a hybrid, beginning in contract and ending in tort.

Strict liability in tort is free from traditional concepts of contracts and it is a more suitable formulation for recovery than the new implied warranties of merchantability or suitability. Certainly a new and independent body of products liability law has been promulgated which parallels the implied warranties under Article Two—The Sales Act—of the UCC. Strict liability in tort has been applied to the leasing of a motor vehicle in a case which held "the offering to the public of either trucks or pleasure vehicles for hire necessarily carries with it a repre-

---

[5] For discussion of products liability, see Dickerson, *The Basis of Strict Products Liability*, 17 Bus. Law 157 (1961); *See also* Vanderwark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168 (1964); Hardman v. Helene Curtis Indus., Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

[6] State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

[7] Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305, 311-12 (1965).

[8] *Id.* at 312.

sentation that they are fit for consumer operation."[9] The doctrine has been extended to a demonstrator intended only for trial use without any consideration whatsoever being given for its use.[10]

In a late case the plaintiff was injured while using a defective tool which had been purchased by his wife.[11] He sued both the retailer and manufacturer alleging both negligence and breach of warranties. The retailer defended successfully, but the manufacturer was held strictly liable in tort for placing a defective article on the market when he knew that it would be used without an inspection for defects, when the defect resulted in injury. The court held that it was not necessary for the plaintiff to establish either an expressed or implied warranty. The purpose of strict liability in tort is to insure that the cost of injuries resulting from defective products are borne by the manufacturers who place such defective products on the open market instead of by the injured persons who are powerless to protect themselves.[12]

Sometimes the theory of *res ipsa loquitur* will be substituted for strict liability in tort. An example of this is found in *Necaise v. Chrysler Corp.*[13] where a bolt on the frame of a truck apparently came loose while being tested for the Navy and allegedly resulted in the test driver's death.

This sociological shifting of liability to the manufacturer of the product without privity and without fault is spreading rapidly and is now accepted by many states.[14] Failure to either discover or guard against a defect in the product is no defense to strict liability.[15]

The famed Dean Prosser hailed the "Fall of the Citadel of Privity" in products liability cases and concluded that the fall, as is true in other historical events, would be followed by "sack, slaughter, riot, rape and rapine."[16] Certainly his prophesy has exceeded even his expecta-

---

[9] Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769, 777 (1965).

[10] Delaney v. Townmotor Corp., 339 F.2d 4 (2d Cir. 1964).

[11] Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (Sup. Ct. 1962), 13 ALR 3d 1059.

[12] *Id.* at 900.

[13] 335 F.2d 562 (5th Cir. 1964).

[14] Prosser, *The Assault Upon the Citadel—Strict Liability to the Consumer*, 69 Yale L.J. 1099 (1960); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 Rutgers L. Rev. 692 (1965); Dickerson, *How Good Does A Product Have To Be?*, 42 Ind. L.J. 301 (1967).

[15] McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Texas 1967).

[16] Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966).

tions. In many of the cases cited above, the "Johnny-Come-Lately" conquerors of the Citadel are extending the new liability concept past the manufacturer and now include the distributor, wholesaler, retailer, and others.[17] While misrepresentation and fraud have always been grounds for liability in Mississippi,[18] the new concept of strict liability in tort adopted in the *State Stove* decision gives an injured plaintiff a new theory of recovery.

II. Basic Concept Liability Under Warranties

Mississippi never enacted the Uniform Sales Act, and therefore, Article Two of the UCC has many novel and interesting features. This is the largest unit of the Code consisting of 104 important sections. Many students believe it to be the most important article and have referred to it as the very heart of the Code. Certainly the Plaintiffs' bar in other states have profited by its *ex contractu* theories of expressed and implied warranties. Judgments awarded in products liability cases since the UCC enactments average more than awards in automobile accidents. There is no way to even estimate the number of small cases settled or tried and not appealed involving radios, televisions, refrigerators, washing machines, hearing aids, and hundreds of other small appliances.

Privity of contract is not required to maintain an action for a breach of either expressed or implied warranties.[19] However, the UCC limits the class of plaintiffs who may bring suit:

> A seller's warranty, whether expressed or implied, extends to any natural person, who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.[20]

However, comment 3 of this section is highly significant and must be considered in interpreting the section:

---

[17] Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 Rutgers L. Rev. 692 (1965).

[18] Lloyd Ford Co. v. Sharp, 192 So. 2d 398 (Miss. 1966).

[19] State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966) *cert. denied*, 386 U.S. 912 (1967). *See* UCC § 2-318; Restatement (Second) Law of Torts Sec. 402 A (1965).

[20] Miss. Code Ann. § 41A:2-318 (Special Supp. 1967). Greenberg v. Lorenz, 9 N.Y.2d. 195, 173 N.E.2d 773, 213 N.Y.S.2d 773 (1961).

> This section expressly includes as beneficiaries within its provisions, the family, the household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.[21]

The early cases[22] limited the recovery to any person in the family of the buyer, or to a guest in his home. The later cases enlarge the class of plaintiffs. In a recent case[23] a nephew of the buyer who lived next door was permitted to recover while using a vaporizer-humidifier in the buyer's home which resulted in his death. The court found it was reasonable to assume that the nephew would use this expensive unit.

It is interesting to note the remarks of a defense attorney concerning strict liability in tort:

> The clever plaintiff's lawyer who once grieved that he couldn't champion the poor widow who hit her thumb with a hammer, now may be able to procure for her at least a nuisance payment from the manufacturer of the hammer, sued for defective design; more money from the manufacturer of the nail, sued for defective design and for the use of deficient materials—the nail bent when she struck it that glancing blow; and perhaps additional compensation from the maker of the board who should have known that she would try to drive a nail into that knot. If the case against the lumber dealer were tried, it is likely that the jury would be allowed to decide whether the knot made the board defective.[24]

Warranties under the Code are created by the seller and are divided into expressed or implied classes:

A. Express Warranties

Express warranties include:

1. Warranty of title and against infringement of patents, copyrights, etc.[25]

2. Warranties by affirmation, promise, description or sample.[26]

---

[21] UCC § 2-318, Comment 3 (1962).

[22] Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).

[23] Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966).

[24] Tozer, *Preparation and Use of Technical Evidence in Products Liability Cases*, DEFENSE LAW JOURNAL 669, 669-670 (1967).

[25] MISS. CODE ANN. § 41A:2-312 (Special Supp. 1967).

[26] MISS. CODE ANN. § 41A:2-313 (Special Supp. 1967).

(A) "Any affirmation of fact or promise made by the seller to the buyer, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."[27] An example of this is a case in which seed had stamped on its label a well-known trade brand type and the seed failed to grow as warranted.[28] The plaintiff was successful in his action.

(B) "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."[29] Where the manufacturer advertised a windshield as being "so made that it will not fly or shatter under the hardest impact," the plaintiff was allowed recovery when a pebble struck the windshield and flying fragments resulted in the loss of his eye.[30]

(C) "Any sample or model, which is made part of the basis of the bargain creates an express warranty, that the whole of the goods shall conform to the sample."[31] Where a model rear axle assembly was shown to the purchaser it was held that the safety allegations did not anticipate that if the rear axle assembly's inner seal failed with wear, oil would flow into the rear wheel assembly and cause brake failure.[32]

(D) "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[33]

(E) Such express warranties may be included in radio, T.V., magazine, newspaper, pamphlets, cartons, labels, tags, salesmen's statements, and many other forms of expressions. The manufacturer also has a duty to warn of dangers from his product such as allergies or side effects. The courts go further and hold the manufacturer liable for foreseeable or

---

[27] *Id.* at (1)(a).

[28] Klein v. Asgrow Seed Co., 54 Cal. Rptr. 609, 246 Cal. App. 2d 87 (1966).

[29] MISS. CODE ANN. § 41A:2-313(1)(b) (Special Supp. 1967).

[30] Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 88 ALR 521 (1932); *affid.*, 179 Wash. 123, 35 P.2d 1090 (1934).

[31] MISS. CODE ANN. § 41A:2-313(1)(c) (Special Supp. 1967).

[32] Rosin v. International Harvester Co., 262 Minn. 445, 115 N.W.2d 50 (1962). When considering samples or models, a question of fact is often difficult to determine. The manufacturer always claims he intended the model or sample to show only the character of the subject matter or merely to suggest it.

[33] MISS. CODE ANN. § 41A:2-313(2) (Special Supp. 1967).

anticipated dangers. In one case[34] the plaintiff applied a balm to his chest, put on his pajamas and was smoking in bed. Ashes from his cigarettes fell and the vapors from the balm burst into a flash flame which burned his face, hair and eyes. There was no warning on the label. Though it was shown that the balm would not normally ignite, the court held the manufacturer should have foreseen that some customer would smoke in bed and allow the cigarette ashes to fall between his body and his pajamas and therefore they should have warned about the dangers of explosion from the fumes.

In your warranty or tort case, you should ask one question—was it a sale of goods or a sale of services? Sales of goods are predicated upon contract and are covered by warranties, either express or implied. In cases involving sales of services, tort law usually governs.

"[W]arranty sections of this article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents."[35]

B. Implied Warranties

The plaintiff's bar in other states have certainly opened Pandora's box, and through imagination, ingenuity and thorough preparation they have recovered under the implied warranty theory for ill effects from food, drugs, cosmetics, household appliances, power tools and mowers, furniture, hearing aids, blow-out of tires, automobiles, airplanes, defective cartons, flammable fabrics or for those causing skin irritation. This revolution of expectation and foreseeability may be expected in any product manufactured and placed in commerce.

---

[34] Martin v. Bengue, Inc., 25 N.J. 359, 136 A.2d 626 (1957).

[35] Uniform Commercial Code § 2-313, Comment 2 (1962). A sale is the "placing an article in the stream of commerce." The sale of food in a restaurant is a sale of goods within the meaning of § 41A:2-314(1) of the Mississippi Code but a bearty parlor treatment is a service and not a sale under warranties, *e.g.*, Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (1963).

A more complicated situation exists in repairs of personal property where there is a non-sale and seems to depend upon the agreement.

A pre-Code case, Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954) holds that making blood available for a patient is a service; however, the latest reported case under the Code holds it to be a sale—See Jackson v. Muhlnberg Hosp., 232 A.2d 879 (N.J. 1967).

To the average attorney the implied warranty theory may seem very dull and uninteresting. However, there is a prepared list of 2,214,-925 defective autos, buses, trucks, motorcycles, and ambulances reported to the Department of Transportation from September 30, 1966 to May 1, 1967. If you are involved in an auto case under the 50,000 miles or five year warranty or any implied warranty, this master list of model and of specific defects will prove a real asset.[36] At a recent meeting an assistant surgeon general told a congressional subcommittee and U. S. Public Health Service officials and the Atomic Energy Commission that the eye is particularly vulnerable to the kind of "soft" X-ray light emitted from most color TV's or other electronic devices. General Motors recalled over a million Chevrolets this fall to have acknowledged defects corrected. Ford is spending large sums in a new engineering technique which will enable the front end of the car to absorb as much as possible of an impact before it reaches the passenger compartment. This will necessitate strengthening of the passenger space. Ford will also equip all 1969 models with safer tires. The Federal Highway Administration recently revealed that Goodyear Tire and Rubber Company and Dunlap Tire and Rubber Company recalled over 100,000 defective tires during the past seven years. Human error may have let many others slip by which were placed in commerce.

An implied warranty can arise out of an ordinary transaction:

> [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.[37]

Comment 1 to UCC section 2-104 notes that if the buyer is a merchant a different rule applies because both parties are chargeable with the knowledge or skill of merchants.[38] Thus, a higher degree of knowledge and skill is required between such parties in their locality.

---

[36] Prepared by Cornelius R. Gray, Director of the American Automobile Association, Legal Department. The list does not mean that a particular car is defective. The vehicles reported are those which may contain defects as determined by the manufacturers themselves. (For copy send $1.00 to TRIAL—American Trial Lawyers Association, No. 6 Beacon Street, Boston, Massachusetts 02108.)

[37] MISS. CODE ANN. § 41A:2-314(1) (Special Supp. 1967).

[38] MISS. CODE ANN. § 41A:2-104 (Special Supp. 1967): "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary, who by his occupation holds himself out as having such knowledge or skill."

Goods to be merchantable under the UCC must:

(1) "Pass without objection in the trade under the contract description."[39]

(2) Fungible goods must be "of fair average quality as set forth in the description."[40] For example, air brakes described by the manufacturer as "big safety-sure stop air brakes" which failed rendered the seller liable.[41]

(3) Be "fit for the ordinary purpose for which such goods are used."[42] Where a vaccine for blackleg was used and twenty-nine calves died, the Kansas Supreme Court held that the plaintiff was entitled to present his claim for breach of implied warranty against all defendants.[43]

(4) "Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved."[44] A purchaser of a pair of shoes has been held to have a sufficient cause of action against a shoe manufacturer, where the manufacturer failed to warn that work shoes were very slippery when wet when he advertised them as safe in all weather.[45]

(5) "Are adequately contained, packaged, and labled as the agreement may require."[46] The requirements of the Fair Packaging and Labeling Act, which went into effect July 1, 1967 fall within this sub-

---

[39] Revlon, Inc., v. Buchanan, 271 F.2d 795 (5th Cir. 1959).

[40] Miss. Code Ann. § 41A:2-314(2)(b) (Special Supp. 1967). In this computer age, many wholesalers substitute an inferior quality of the same manufacturer's brand. Retailers have a form: "Pursuant to Sec. 2-607 of the UCC because of inferior grade, we are deducting our damages in the sum of $_____ which is only a portion of the damages we suffered. Attached is check for $_____, the balance due in full for this shipment." If the wholesaler accepted such a check, there would certainly be an accord and satisfaction under the rule applied in Cooper & Rock v. Yazoo & M.V.R. Co., 82 Miss. 634, 35 So. 162 (1903); and Simmons v. Langston, 241 Miss. 481, 128 So. 2d 749 (1961).

[41] Nichols v. Baker, 101 Ariz. 151, 416 P.2d 584 (1966).

[42] Miss. Code Ann. § 41A:314(2)(c) (Special Supp. 1967).

[43] Chandler v. Anchor Serum Co., 198 Kan. 571, 426 P.2d 82 (1967); *accord,* Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959) fish food.

[44] Miss. Code Ann. § 41A:2-314(2)(d) (Special Supp. 1967).

[45] Fanning v. Lemay, 222 N.E.2d 815 (N.J. 1967); *accord,* Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817 (3d Cir. 1951).

[46] Miss. Code Ann. § 41A:2-314(2)(e) (Special Supp. 1967).

section. Bottled drinks[47] and aerosol containers[48] have provided the basis of liability.

(6) "Conform to the promises or affirmations of fact made on the label or container, if any."[49] A few hours after being given an injection a six-month-old healthy child suffered his first general convulsion. Difficulties continued and he failed to show normal development. Doctors testified that at age seven he would have to be institutionalized because his brain and nervous system were permanently damaged. The court held that the manufacturer was negligent in failing to adequately test the drug and to give warning of danger inherent to its use.[50]

(7) Properly warn of foreseeable side effects and allergies. In a late case the drug "Aralen" was sold for arthritis. It caused the plaintiff to become almost completely blind. The contraindication against the eye was discovered seven years before plaintiff suffered the effects, during which time she had been taking the drug regularly. The defendant company proved that it distributed leaflets warning of the danger, but the plaintiff's doctor testified he did not see it and that the company's detail men who visited him never mentioned it. A judgment of 180,000 dollars was upheld.[51] Some attorneys see the ruling as applicable to all potentially hazardous products while others say it only applies to drugs and then only where the side effects are serious.

---

[47] *E.g.*, Johnson v. Coca Cola Bottling Co., 239 Miss. 759, 125 So. 2d 537 (1960). All of the requirements of the Fair Packaging and Labeling Act of 1966 (effective July 1, 1967), 15 U.S.C. Sec. 1451-1461 (Supp. II 1967), will be included by implication. This Act authorized broad regulatory powers by the Food and Drug Administration and the Federal Trade Commission in the field of packaging and labeling. It also gave the Department of Commerce an important mandate in the area of products standardization by industries. Proposed labeling regulations have already been promulgated by the Food and Drug Administration. We may expect many novel concepts of "undue proliferation," "value," "comparison" and other provisions of the Act for all consumer products; also, the requirements of both the Pure Food & Drug Act, and the Uniform Narcotic Drug Act will have to be met.

[48] Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966).

[49] Miss. Code Ann. § 41A:2-314(2)(f) (Special Supp. 1967).

[50] Stromsodt v. Parke-Davis & Co., 257 F. Supp. 991 (N.D. 1966) where $500,000.00 was held to be a fair and adequate verdict. *See also* Paclanski v. Bristol Laboratories, Inc., 425 P.2d 452 (Okla. 1967).

[51] Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159 (S.D. 1967). *See also* Basco v. Winthrop Laboratories, Inc., 268 F. Supp. 26 (Conn. 1967). Where adequate tests prior to marketing would have disclosed the defect in the drug, the manufacturer will be held liable for all damages caused by such defect, even though minimum government standards were complied with Jan. 1967 Ins. Counsel Journal 150.

(8) Are not oversold to the ultimate consumer. The courts have held that such TV admonitions as "come alive" and "join the Pepsi generation" could be considered by the jury if the soft drink contained a harmful substance.[52]

(9) Conform to safety standards even if the product is second hand. A used tractor, although defective, was held to be covered by an implied duty to warn of the defect.[53]

(10) In addition, the manufacturer must warn the user when there is a limitation of the product's protection. A 200,000 dollar award for the death of a fireman whose blood was shown to contain 65 percent carbon monoxide saturation—35 percent above the amount deemed fatal—was upheld when the city failed to warn the fireman of the loss of effectiveness of a gas mask to convert carbon monoxide beyond a certain concentration and also to warn of the density of the atmosphere and the gas mask's capacity for safety.[54]

C. Implied Warranty of Fitness for Particular Purpose

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose."[55]

In *McKee v. Brunswick Corp.*[56] the plaintiff purchased a boat May 6, 1966 for pleasure cruising. On June 3 he invited guests out for a cruise. When the boat caught fire and the gas tank blew up all aboard were injured. The proximate cause was traced to an ignition coil that short-circuited. The plaintiff and all of the guests sued the manufacturer of the defective coil, the boat builder, and the local dealer. All three were held liable. The builder and dealers could not prove that they failed to add a protective fuse. Breach of duty to test and find the defect in design was proven. Automobile manufacturers have had to contend

---

[52] Tedder v. Pepsi Cola Bottling Co., 154 S.E.2d 337 (N.C. 1967); *See also* 2 Frumer & Friedman, PRODUCTS LIABILITY, FOOD AND BEVERAGE c. 7 (1967).

[53] Enix v. Diamond T. Sales & Serv. Co., 188 So. 2d 48 (Fla. 1966).

[54] McClave v. City of New York, 19 N.Y.2d 822, 227 N.E.2d 885, 281 N.Y.S.2d 86 (1967).

[55] MISS. CODE ANN. § 41A:2-315 (Special Supp. 1967).

[56] 354 F.2d 577 (7th Cir. 1965).

with this problem for years.[57] The failure of the manufacturer to install safety devices may be the basis of liability.[58] Also the courts have included the manufacturer's duty to warn, to furnish detailed directions for use and to foresee possible danger under implied warranties.[59]

D. No Disclaimer Included In UCC In Mississippi

There is a wealth of material dealing with disclaimer of implied warranties in the original version of the UCC, but these references have been omitted in the version adopted by Mississippi. Senator E. K. Collins, Chairman of the Mississippi Senate Judiciary Committee, felt that a manufacturer should not place his product in the stream of commerce and then be allowed to disclaim all liability, and he was successful in his efforts to exclude disclaimers. This is a matter of protection of the public.

E. Cumulation and Conflict of Warranties Express or Implied

"Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant."[60] Express warranties do not negative implied warranties unless inconsistent.[61]

F. Proof Requirements of the Plaintiff

Since the enactment of the Code there has been an emphatic shift from *caveat emptor* (buyer beware) to the modern trend where it is now the manufacturer who must beware *(caveat venditor).* If the product was defective when it left the manufacturer, liability results.[62]

---

[57] *Cf.* Carpini v. Pittsburg & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954). A good discussion of this issue appears in the following: Comment, *Manufacturer's Liability for Defective Automobile Design,* 42 Wash. L. Rev. 601 (1967); Note, *Liability For Negligent Automobile Design,* 52 Iowa L. Rev. 953 (1967).

[58] Ulwelling v. Crown Coach Corp., 23 Cal. Rptr. 631, 206 Cal. App. 2d 96 (1962).

[59] Yarrow v. Sterling Drug, 263 F. Supp. 159 (S.D. 1967).

[60] Miss. Code Ann. § 41A:2-317 (Special Supp. 1967).

[61] Ford Motor Co. v. Cullum, 96 F.2d 1 (5th Cir. 1938).

[62] See collection of cases in The National Observer, Jan. 14th 1963, at 1.

Under the UCC in a products liability action predicated on warranties, either express or implied, it is concluded the plaintiff or purchaser must prove:[63]

1. Existance of a warranty, either express or implied in his favor.[64]

2. A breach of that warranty by defendant, including proof that the product or service was defective when sold and that the product was harmful when used as directed.[65]

3. That the proven defect was the proximate cause of the plaintiff's injury as alleged.[66]

4. That the plaintiff relied on the defendant's warranty.[67]

5. Notice to the defendant of the breach of warranty was given within a reasonable time.[68]

G. "Foreign—Natural" or "Reasonable Expectation" Tests

The early cases under the Code arose when harmful substances were found in food and the plaintiff alleged a breach of warranty of fitness. The early cases were based on the "foreign-natural" test which held that if you ordered a chicken pot pie you should know that a bone might be in it that would choke you and you should anticipate and guard against such contigences.[69] Our Fifth Circuit recognized that there was respected authority on the "foreign-natural" tests but held that a fragment of crab shell in a fish dish was a breach of the implied warranty of fitness.[70]

III. Venue In Products Liability Cases

A question that often arises is how to get jurisdiction on a nonresident manufacturer in a products liability case after the *Lee v.*

---

[63] Witherspoon, *Do You Have A Products Liability Case?*, 36 Miss. L.J. 38 (1964).

[64] Miss. Code Ann. § 41A:2-607(4) (Special Supp. 1967).

[65] Rossignol v. Danbury School of Aeronautics, Inc., 227 A.2d 418 (Conn. 1967).

[66] *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Texas 1967).

[67] Witherspoon, *Do You Have A Products Liability Case?*, 36 Miss. L.J. 38 (1964).

[68] Miss. Code Ann. § 41A:2-607(3(a) (Special Supp. 1967).

[69] Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936).

[70] Arnaud's Restaurant, Inc. v. Cotter, 212 F.2d 883 (5th Cir. 1954).

Memphis Publishing Co.[71] decision. The Mississippi Supreme Court has not determined this specific question but the same 1966 legislature that unanimously enacted the UCC extended the venue statute.[72] Now for the first time Mississippi has a "long arm" statute.

The statute provides that:

> Any non-resident, person, firm, general or limited partnership or any foreign or other corporation not qualified under the Constitution or laws of the State as to doing business herein, who shall make a contract with a resident of this State, to be performed in whole or in part by any party, in this State or who shall commit a tort in whole or in part in this State against a resident of the state, or who shall do any business or perform any character of work or service in this state shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the Secretary of State of the State of Mississippi to be the true and lawful attorney agent of such nonresident, upon whom all lawful process may be served. . . .

This section is analogous to Mississippi's non-resident motorist statutes.[73] In other jurisdictions with statutes not as inclusive as is the Misisssippi statute the validity of similar enactments has been upheld.[74]

If your case involves only small damages, the chances are the manufacturer will wish to protect his local agent, avoid unfavorable publicity for the product, and will make an amicable settlement after suit is filed.

---

[71] 195 Miss. 264, 14 So. 2d 351, 152 ALR 1428 (1943).

[72] MISS. CODE ANN. § 1437(a) (Supp. 1966).

[73] MISS. CODE ANN. § 8285.05 (Supp. 1966).

[74] *See generally*, 20 Am. Jur. 2d, §§ 105, 119, 145.

In other jurisdictions such statutes have been held to be valid. An Illinois plaintiff sued for an explosion of a water heater that resulted from a valve negligently manufactured by an Ohio corporation and placed in the product by a Pennsylvania assembler. Both were liable. The assumption of jurisdiction was not a denial of due process, because if a foreign corporation sells its product to a user it is answerable for damages caused by its negligence. Although it may be inconvenient for the manufacturer to attend court where its product was marketed, the benefit of the market was sought and the forum state is interested in seeing that products delivered within its borders are sound and that its citizen are compensated if they are unsound—*e.g., Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), noted in 75 Harv. L. Rev. 1431 (1962).

Advertisement and solicitation by a foreign third party defendant manufacturer within the forum state constitutes sufficient minimum contacts to permit service of process under the forum state's "long arm" statute. *Harford v. Smith*, 257 F. Supp. 578 (N.D.W.V. 1966). Because the safety of the public is at stake the sale of a dangerous product is regarded as a more substantial contact than the sale of a

CONCLUSION:

In selecting a theory of liability in torts *ex delicto* or under the *ex contractu* concept of warranties, express or implied (under the UCC), these fundamental distinctions may be considered.

1. Even under the strict-liability in torts concept, a manufacturer can not disclaim liability.[75]

2. Disclaimers of warranties do not apply to personal injuries arising from the use of consumer goods.[76]

3. There is always the defense of contributory negligence where the product was not used as directed by the manufacturer.

---

harmless one. *Lichina v. Futura, Inc.*, 260 F. Supp. 252, 256 (D. Colo. 1966). The minimum contact requirement is also satisfied if defendant derives substantial revenues from the forum state. Two recent federal decisions demonstrate the court's readiness to find a sufficient basis for jurisdiction over out of state persons and corporations. *Hardy v. Rekab, Inc.*, 266 F. Supp. 508 (D. Maryland 1967) involved the Maryland "long arm" statute which permits Maryland courts to exercise jurisdiction over a person "as to a cause of action arising from the person's (1) transacting any business in this State. . . (2) causing tortious injury in this state by an act or omission in the State." The action arose out of injuries sustained in Maryland on an amusement ride manufactured by the defendant, an Oregon corporation. The manufacturer did not maintain an office in Maryland. The only acts of the manufacturer which actually took place in Maryland were the delivery and the supervision of the installation of the ride by one of its representatives. Nevertheless, the court found "sufficient minimum contacts" *(International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95, (1954) to support the maintenance of a suit in Maryland and to authorize service on the defendant Oregon corporation. In addition the Maryland long-arm statute was given retroactive effect.

A similar interpretation was placed upon the New York long-arm statute in *Liquid Carriers Corp.* v. *American Marine Corp.*, 375 F.2d 951 (2d Cir. 1967), a breach of contract action. The contract provided for the building of a barge in Louisiana by the defendant, a Louisiana corporation. Plaintiff was a New York corporation. The defendant's only contact with New York included the periodic participation by its vice president in certain negotiations there. It was found that the participation in negotiations constituted such a "transaction of business" as to subject the defendant to the jurisdiction of the New York courts. Such jurisdiction appears to hinge on the physical presence of a defendant's agents or property in the forum state in connection with the transaction in question.

---

[75] Seely v. White Motors Co., 63 Cal. 2d 1, 45 Cal. Rptr. 17, 403 Pac. 2d 145 (1965).

[76] W. Prosser, LAW OF TORTS, § 78 at 539 (3d ed. 1964). Dean Prosser suggests the manufacturer may have some defense of assumption of risk where the consumer buys from a disclaiming manufacturer knowing of the disclaimer.

4. The Statute of Limitations may be different for a tort action than for the Limitation prescribed in the UCC. (UCC Sec. 2-225 limits recovery to six years after the cause accrues.)

5. The ancient privity of contract concept has been abandoned in most jurisdictions, both in tort and under warranty actions under the UCC.

> [I]t seems hardly conceivable that a court recognizing the modern need for a vendee occupant's right to recover on principles of implied warranty or strict liability would revivify the requirement of privity, which is fast disappearing in the comparable products liability field, to preclude a similar right in other occupants likely to be injured by the builder vendor's default.[77]

Negligence or liability under the strict liability in tort rationale applies to any plaintiff injured. The UCC provides that the seller's warranty extends to any natural person who is in the family or a member of his household.

7. In a suit for a breach of warranty the buyer under UCC Par. 2-607(3)(A) is required to notify the seller of such a breach of warranty "within a reasonable time after he discovers or should have discovered any breach." The lapse of time seems irrelevant, however, where the defect was inherent in the product and remained provable. Where the notice was sent two years after a sale the question of "reasonableness" was held to be a jury question.[78] However, this provision of the UCC is regidly enforced and recovery is denied if there is no proof of notice to the seller.[79] (Notice was held to have been given when a basement was flooded and this was reported to the seller.) There is no notice required in negligence or tort actions.

8. The modern concept does not rely on warranties, either express or implied, but upon general warranties predicated upon principles of tort—"[A] violation of a duty to members of the general public to prevent them from suffering injuries as a result of the wrongful manufacture or distribution of any particular article or articles."[80] Certainly, it would seem that the new and modern theory of strict liability in tort is a novel common law rule in products liability and is entirely independent of the UCC.

---

[77] Schipper v. Levitt & Sons, Inc., 44 N.J. 95, 207 A.2d 314, 328 (1965).

[78] Massari v. Accurate Bushing Co., 8 N.J. 299, 85 A.2d 260 (1951).

[79] Caparrelli v. Rolling Greens, Inc., 39 N.J. 585, 190 A.2d 369 (1963); Johnson v. Hoffman, 7 N.J. 123, 80 A.2d 624 (1951). Under the Sales Act, 10 months notice was sufficient: Prichard v. Liggett & Meyers Tobacco Co., 295 Fed. 2d 292 (3d Cir. 1961).

[80] Ruderman v. Warner-Lambert Pharmaceutical Co., 23 Conn. Supp. 416, 184

9. Remember under the UCC the Statute of Limitation begins to run in a breach of warranty case when the seller tenders delivery, and if a personal injury occurs after the statute has run, no action may be commenced, whether the aggrieved plaintiff knew of the breach or not.[81] In tort actions the date of the injury usually determines the date the Statute of Limitation begins to run.

10. Products Liability law is developing at a rapid and fascinating pace.[82] Many precedents have been abandoned and the decisions have shifted to a sociological concept. Plaintiff's attorneys shows great ingenuity and imagination in developing liability under the doctrines of foreseeability of danger, the duty to warn, and directions to use.[83]

11. In a claim arising out of contract, including fraud, there may also be an independent claim in tort.[84]

It is hoped these observations will prove practical and profitable in your approach and background study of your next products liability case.

A.2d 63, 65 (1962) citing Hamon v. Digliani, 148 Conn. 716, 174 A.2d 296 (1961), and the earlier case of La Hue v. Coca-Cola Bottling Co., Inc., 50 Wash. 2d 645, 314 Pac. 2d 421 (1957). *See also:* Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 Pac. 2d 897, and Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965).

[81] UCC 2-725 (2). "A cause of action accrues when breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance of the cause of action accrues when the breach is or should have been discovered." Rufo v. Bastian Blessing Co., 207 A.2d 823 (Pa. 1965) holding the Statute of Limitations began to run from the date the plaintiff took delivery of the alleged defective cylinder and not from the date of the breach of the warranty.

[82] The warranty aspect—express and implied—is governed by the Code. See Freeman, *Products Liability Under the UCC,* 10 PRAC. LAW. 49 (1964).

[83] Witherspoon, *Do You Have A Products Liability Case?,* 36 Miss. L.J. 30, 35-37, (Dec. 1964).

[84] Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U.S. 445 (1909); McClaim, *Implied Warranties in Sales,* 7 Harv. L. Rev. 213 (1893); Prosser, *Implied Warranty of Merchantable Quality,* 27 Minn. L. Rev. 117 (1943).

STATE BAR SECTION

PANEL DISCUSSION ON SECURED TRANSACTIONS

HON. GRANT GILMORE, Moderator
HON. PETER F. COOGAN
HON. ROBERT BRAUCHER
HON. MARVIN A. COHEN
HON. GEORGE W. STENGEL

BY MR. GILMORE:

Instead of lecturing at you for the next three hours, my colleagues and I will engage in sort of a cross-talk vaudeville act, totally unrehearsed, deeply spontaneous, and in the course of the next three hours or so, we will tell you about Article 9.

If we stayed here three days we could not even begin to tell you all about Article 9. We will tell you a few things. With respect to all the things we don't tell you about, Mr. Coogan and his colleagues have written a large book about Article 9, I have written a large book about Article 9, and anything we don't get to today, you can look up either in Mr. Coogan's book or in my book.

Let me say this. In the course of our discussion we shall probably dispute occasionally among ourselves. We shall probably find points to criticize in the statute, divisions that are ambiguous, divisions that are perhaps contradictory, divisions that one or another of us may think are simply wrong.

But let me say this, to avoid any possible misconceptions. Whatever points we may find to criticize in the drafting or the policy of the Article —I'm sure I speak both for Professor Braucher and Mr. Coogan—we are all thoroughly committed to the proposition that it is a good statute. We are proud to have been associated with it. We have urged its enactment throughout the country. It seems to have worked quite well in the many states in which now over a considerable number of years it has been in effect, but we see fly specks in it occasionally. That doesn't mean that we love it any the less.

Before we go into our many-sided, many-splendored panel discussion, perhaps a few introductory generalities about Article 9 as a whole might be helpful.

Back in the days when the Article was being drafted, under the sponsorship of the American Law Institute and the National Conference

* Presented at the 22nd Annual Mississippi Law Institute, December 9, 1967.

of Commissioners of Uniform State Laws, it was occasionally thought or suggested that what became Article 9 of the Code was a pretty revolutionary thing, no doubt too revolutionary. The members of the Law Institute and Commissioners on Uniform State Laws are not, so far as I have had occasion to observe them, particularly revolutionary in their habits of life or patterns of thought. So it would be, offhand, surprising that from such respectable sources there should have proceeded a statute subversive of the American way of life. Although when you start describing it, Article 9 sounds as if it is a pretty revolutionary thing, it is true of this article, as it is of all of the other articles of the code, that far from being any sort of break with the past, it is a continuation of the past. It stands rooted in the past, it changes very little, if any, substantive law.

There are occasional changes, but nothing dramatic. Indeed, I think you will find as you move over next spring practicing under your existing law and practicing under Article 9, that, except for a few formalities, the changes that you will have to make in what you have been doing all the time are minimal. If that is true, as it is, what was all the talk about revolution?

If you start describing Article 9, the first thing you say is that Article 9 abolishes all known security devices in personal property, both tangible and intangible, and sets up its own new structure. Chattel mortgages, deeds of trust, trust receipts, assignments, accounts receivable, contracts, conditional sales, factor's liens, this long list of all the various types of devices that have grown out of the past hundred years for the financing and security of personal property, are hereby abolished. Now, that certainly sounds revolutionary, and that was what worried people at one time. In fact, as I have said, the changes in substantive law are minimal. The most noticeable, perhaps the most important change as you pass from the precode law to Article 9 is in the terminology, the words, the vocabulary the Article uses: the vocabulary is completely novel.

The reason for having chosen a new vocabulary in Article 9 was principally that carrying forward the old vocabulary was thought to give the impression that to some extent substantive rules applicable to that particular device were being carried forward or could be restored to in case of doubt or ambiguity of Article 9 itself.

From the vocabulary point of view therefore it was decided to make a fresh start; to use a whole series of new terms that had no statutory or common law or precode roots. Thus the parties to an Article 9 security transaction are known as the "secured party," the person who makes a loan and takes back a security interest in property; the other

party to the transaction is known as the "debtor," the person who borrows money and puts up his property as security. The property which secures the loan is called the "collateral." The interest resulting from the transaction is a "security interest." So we have one set of terms, all new terms, used to describe any kind of interest in any kind of personal property. Most of these terms, all the terms I have mentioned, are defined terms under statutory definitions. Most of the definitions are segregated in Part 1 of the Article, which is principally a definitional part. Thus in 9-105 you will find definitions of "secured party," "debtor," "collateral" and "security argreement."

I should call your attention to the key term "security interest." You do not find it in Article 9 at all, but in Article 1. The drafting scheme of the code was that terms which were used in more than one of the subsequent Articles 2 to 9 were put back in Article 1.

The term "security interest" appears not only throughout Article 9 but is also used in Article 2 on sales, Article 4 on bank collections, Article 5 on letters of credit, etc. It has a general definition; therefore, you find it in Section 1-201, subsection (37). If you look at it you will see it's a long half-page definition. The operative part of it is the first sentence, which is very vague, broad and freewheeling: " 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation." It is essentially a matter of judicial determination. Then, in the definition, there follows a series of sentences devoted to points which occasioned litigation in the past to determine when things like leases and consignments are security interests and when they are not.

One pair of terms used in the Article, key terms, difficult terms, describes when a security interest arises as between the parties to the transaction. Another term is used to describe the point at which a transaction becomes good against third parties. The term used to describe the point at which a security interest comes into being is the word "attach," or "attachment." When the fairly simple formal requisites in the Article have been complied with (when there has been an agreement and the value has been put up) we say the security interest at that point "attaches" to the collateral. We find that term introduced in Section 9-204.

Attachment means the interest is at least good as between the two parties. The whole point of a security transaction, however, is to have an interest that is good not merely against the debtor but against third parties, other secured lenders and creditors.

To acknowledge an interest is not good against third parties until it has been perfected. The term "perfection," like the term "attach-

ment," was used without a precode statutory definition. "Perfection" was taken from the language in case law under Section 60, Federal Bankruptcy Act.

At the beginning of Part 3 of the Article you get a series of sections which tell you what classes of interests prevail over security interests so long as they remained unperfected. In 301 and 302 and following sections you are told what you have to do in order to have an interest which has not only attached to the collateral as against the debtor but has become perfected as against third parties. Typically some further act, either taking possession of the collateral by way of pledge or filing some kind of public statement, is required as an act of perfection in addition to the things that are required to make the interest enforceable against the debtor. Thus we have these two central terms running through the Article on attachment and on perfection.

The draftsmen divided Article 9 into five parts. The first part, Part 1, the 100 sequence, is mostly a string of definitions that appear formidable indeed. I think I can assure you there is a good deal less here than meets the eye. The difficulty and the importance of the definitions in Part 1 can easily be overstated. You will gradually come to live with them. You will find less trouble with them than you might anticipate.

Part 2 is a series of sections mostly having to do with the relationship between the two parties to the transaction.

Part 3 starts with sections on perfection: how you perfect, when you must perfect, what the consequences are of not perfecting. Part 3, which consists of eighteen quite complicated sections, deals in general with the validity and enforceability of security interests against third parties and sets up an extremely elaborate system of priorities. The key priority section through this sequence is in 312, which in itself runs on for a page and a half of statutory attachments, starting with subsection (1), a sort of index section, which refers you back and forth to other sections in the priority sequence. This is undoubtedly the most difficult, complicated and obscure part of the Article.

The simpler you can keep your security transaction, i.e., the more you can make it look like the old-fashioned mortgage, the less you will need to deal with the priority provisions in Article 9. The more complicated you allow your transaction to become, the more you take advantage of the many permissive provisions of the Article, the more likely you are to have to wrestle with the really hard problems contained in the priority sequence.

Part 4 is a series of sections dealing with the mechanics of filing. Perhaps the greatest accomplishment of Article 9 in simplifying the

pre-code law, was to substitute a single filing system for the congeries of filing systems which have in most states grown up under pre-code security statutes.

Under Article 9 there is one filing system in which a hard problem results: in real estate filing for so-called fixtures. All personal property security interests are put on public record. Part 5 has to do with rights and remedies on default. At that point the draftsmen of the Article were in a very happy situation. Under past security statutes, whether dealing with real property or personal property, there have been two general approaches. One was to require that the security interests be foreclosed through judicial proceedings under judicial supervision. That would work very badly. The deficiency judgment was almost guaranteed. The other approach has been principally tried in most conditional sales. Conditional sales legislation enacted in the early part of the century dispensed with the judicial proceedings, allowed the conditional seller to foreclose his interest by selling the chattel himself, but hedged the sale with very rigid restrictions. He had to sell in a particular way by public sale at auction at a particular place at a particular time after prescribed kinds of notices and waiting periods and so on. That worked just as badly as foreclosure through judicial proceedings. Resultant deficiency judgments were as automatic and as large.

No matter what the draftsmen did it couldn't work any worse than all known procedures on default, and maybe something new would work a little better. The approach taken in dealing with default was, as an initial matter, to give the secured party almost complete freedom to do whatever he might want to do. The Article abandons the restrictive provisions of earlier statutes as to conditional sale legislation and also abandons any required resort to judicial proceedings. The heart of the matter is found in Section 9-504 (3), which provides that disposition of the collateral may be by public or private proceedings, may be made by way of one or more contracts, sale or other disposition, may be as a unit, in parcels, and any time and place and any terms. But every aspect of the disposition, including the method, manner, time and place and terms, must be commercially reasonable. The term "commercially reasonable" runs through the code like a red thread. It is one of the few terms used in the code which is not the subject of a statutory definition. What is commercially reasonable and what is not commercially reasonable is up to the judges.

Along with this very freewheeling approach, the default provisions write in a very broadly stated right of judicial review of whatever the secured party does. The judicial review may be prospective, that is,

before he has done anything the Court may require what he plans to do, or retrospective, after he has done it the court will decide whether what he did was proper. You find that stated in 9-507, subsection (1).

So the general approach of default is a very permissive approach. Let the secured party do whatever he likes, subject to the condition that whatever he does must be commercially reasonable, and that will be implemented by a very broadly stated provision relating to judicial review, prospective or retrospective.

Let me make one final comment by way of generality. The comments (the official comments which in the full edition of the code accompany the statutory text) are not part of the statute. They are not enacted by the legislature. They are official comments prepared and promulgated by the sponsoring organization. They purport to explain, illustrate and justify the statutory text. They are more than a mere treatise by somebody who claims to know something about the statute. They inhabit a sort of no-man's-land. Frequently the comments are extremely helpful. It is also part of wisdom to deal with them warily and suspiciously. Occasionally you will find comments which do not seem to be responsive to the statutory text. For that there can be a number of reasons. For example, the incompetence of the person who drafted the comment. Also, once somebody had drafted comments and sent them in to the editorial office of the American Law Institute superintending the publication and somebody in that office could have changed the comment around without notifying the author. Sometimes there were a number of revisions of the statutory text, and comments written to accompany an earlier draft were not revised to take account of all the changes that had been made in the text. Therefore there are a great many difficulties in using the comments. They should not be taken as wholly written. Used properly by counsel and the court, they can serve to clarify many difficult issues.

One way into the Article is to run several typical transactions through its net and see where we can come out, and see how different or how similar it may be to what you are already doing.

Let's start with a relatively simple case and get more complicated as we go along. Let's show that a bank is asked to make a loan by a middle-sized manufacturing company, a loan of a hundred thousand dollars to be secured, let's assume, partly by machinery that is already in the borrower's plant, partly by new machinery which he is planning to buy—say fifty thousand dollars worth of machinery to come in.

Mr. Stengel and Mr. Cohen are with us to keep us straight on Mississippi law, and, Mr. Cohen, I take it this is a perfectly possible transaction under Mississippi law?

BY MR. COHEN:

Yes, sir, under a chattel deed of trust.

BY MR. GILMORE:

In most other states that would be called a chattel mortgage. I would suppose, without knowing anything about it, that the Mississippi deed of trust is in substance the same sort of thing as the chattel mortgage in other states. You have a document signed, and you put that on public record?

BY MR. COHEN:

In the chancery clerk's office.

BY MR. GILMORE:

In the deed of trust you have to describe the collateral with some particularity?

BY MR. COHEN:

You very definitely have to describe by serial number and so forth as to machinery.

BY MR. GILMORE:

By the way, Mr. Stengel, assuming that you now have a deed of trust covering machinery of this type on file in the proper office, are you going to have to do anything about that next March thirty-first when the code goes into effect?

BY MR. STENGEL:

Not with respect to completed transactions on existing machinery, but if after-acquired property or future advances are involved, there should be compliance with the code.

BY MR. GILMORE:

So if you are already on file with respect to any transaction of this type, your pre-code filing is continued, and you don't have to refile under the code by the transition provisions, which we find printed as Article 10 of the code, effective date of repealer, particularly here 10-102, subsection (2).

Now, considering this transaction under the code, a new one coming up after March thirty-first of next year, I suppose the first thing that the bank will want to know about is what encumbrances there already are on the debtor's properties.

Let's put ourselves forward in time to a point at which everything is now under the code filing—suppose while checking debtor "X", the bank discovers some prior lender already on file with an extremely broad statement, which says that the prior lender claims all of debtor "X's" property as collateral for his security whenever acquired. Let's assume for a moment that such a broad financing statement, as the code calls the document, is first filed. What conclusion, Bob, do you think the bank should draw from finding such a financing statement already on file?

BY MR. BRAUCHER:

If you are talking entirely under the code, and you don't have to look at prior records under the pre-code law, you would have to say that you were not safe in lending on the pre-existing equipment.

BY MR. GILMORE:

At this point you want to split the machinery that's already in the factory apart from the machinery which I hypothesized was going to go in?

BY MR. BRAUCHER:

As to the pre-existing equipment, if there is a code filing against it or which covers it, you would not be safe in making a loan against that equipment until the record was cleared. The mechanism for clearing it is the filing of a termination statement under Part 4 of Article 9. Unless that's done you would have the happy position of being the second mortgagor.

BY MR. GILMORE:

Then unless you were willing to accept junior lien status, you would have to pay the first man off, buy him out, file a termination statement to clear the record, or I suppose as an alternative get some form of subordination agreement?

BY MR. BRAUCHER:

Yes. There is a mechanism for finding out what is outstanding against this. If you look at 9-208, you can get a statement, if you have

the debtor's cooperation, which you would have if he is trying to borrow money. If you can get his cooperation, he can demand a statement from the other secured party as to what's outstanding, but you should not rely on that.

BY MR. GILMORE:

Now, Bob, suppose having found this earlier man is already on file and you get a statement from him under 9-208 and discover that the debt secured in his case is only $500.00, and that doesn't worry you, you say, "I'm perfectly willing to go in junior to a mere five hundred dollar claim"?

BY MR. BRAUCHER:

That would be a mistake, because as long as that filing is outstanding, under the code there is the risk of future advances which would take priority from the date of the filing under which they were made.

BY MR. GILMORE:

If Lender "A", who is already on file at this point, has put up $500.00, and you put up your $50,000.00 and file on that then Lender "A" then puts in another installment of $50,000.00. You are saying that your intervening loan is going to be subordinate, junior not only to his earlier small loan but to his later big loan?

BY MR. BRAUCHER:

If your record is cleared you are all right, if a termination statement is filed; if you have one of these statements under 9-208 as to the amount, there is a possibility that there might be some kind of estoppel or something that would bar the man, but I would not rely on that. If you have a subordination agreement with the other secured party, then you are all right.

BY MR. GILMORE:

In order to be sure, a subordination agreement should include future advances as well as past advances.

BY MR. BRAUCHER:

Now, if we could shift to the new machinery, the position is quite different, because if you are putting in your money as purchase money to buy the equipment, then you can preserve your purchase money posi-

tion as a first lien position, and that gets you to 9-312, subsection (4). We are talking about equipment, collateral other than inventory, and you must perfect your security interest before the debtor receives possession of the new equipment or within ten days thereafter.

BY MR. GILMORE:

We were hypothesizing a bank which among other things was thinking of putting up $50,000.00 to finance the purchase of new machinery. Now, you said, Bob, that with respect to this sort of new money, purchase money transaction, the bank doesn't have to worry about existing filing; you said, however, under 9-312 (4) the bank must make sure that it perfects its interest before the machinery comes into the debtor's plant.

BY MR. BRAUCHER:

One other qualification: I was relying on a purchase money position, and that gets you into the definition of a purchase money security interest, which is back in Part 1, 9-107. You must be sure either that you are yourself the seller or that your money is used to pay the seller in fact.

BY MR. GILMORE:

It wouldn't do then for the bank to hand its fifty thousand dollar check to the borrower or debtor, and say, "Use this to buy machinery"?

BY MR. BRAUCHER:

No.

BY MR. GILMORE:

The bank would have to make sure that the money went directly to the seller of the machinery. The language Professor Braucher was drawing our attention to under 9-107, Definitions, is that if the lender is to claim special priority, purchase money security, he must see that the money he puts up was in fact used in the acquisition of the property. There is thus a tracing requirement. A lender could not simply advance money to the borrower on the understanding the borrower was to use the money to buy his new equipment. The bank has to do it directly with the seller.

Peter, we have been talking of checking the files to see whether there are other security interests on record. Would it seem to you that the bank proposing to make such a loan could stop there once it discovered there were no other filed security interests around and assume that it was safe to go in?

BY MR. COOGAN:

Apparently not. I am told that under Mississippi law, there is a very peculiar rule with respect to the effect of a judgment lien. In most states one can assume that with respect to personal property if the debtor has possession of it you are safe in assuming that he owns if free from any liens through judicial process. The statute in Mississippi reads otherwise. It says that when the judgment is enrolled the judgment creditor has a lien upon all of the property located within the county.

It seems to me that the Mississippi Supreme Court has sort of vacillated in its interpretation of this particular statute. In one series of cases it has said that this is in the nature of a general lien which is inchoate and is not effective until an execution is issued, but apparently in the latest case the court seems to assume that the judgment lien is effective from the time that the judgment is enrolled. Now, how practical it is to check the county records for judgments I do not know. It may well be that in most cases where not too much money is involved that the secured party just has to take the risk.

This is not a new problem so far as the code is concerned. This problem arose under the chattel mortgage statutes and apparently is still with us.

The *Willis Hardware Company* case[1] is one of the cases, and *Motors Securities Company. v. B. M. Stevens Company,*[2] is apparently the latest. It is the latter case that raises this problem.

BY MR. GILMORE:

So despite Article 9 of the code being a comprehensive, all-embracing security statute, there are in Mississippi and other states all sorts of problems you will still have to deal with under the law outside of the code interacting with Article 9.

Let's consider how we should set up. Assume the bank checks the records, the credit standing sounds good, and it makes the loan. Let's run through the mechanics of the paper work of setting up the agreement and filing.

BY MR. BRAUCHER:

Although this can be varied, my inclination would be that you would begin by filing the financing statement. That's something which you are

---

[1] Willis Hardware Co. v. Clark, 216 Miss. 84, 61 So. 2d 441 (1952).

[2] Motors Securities Co. v. B. M. Stevens Co., 225 Miss. 361, 83 So. 2d 177 (1955).

going to want to do in any event within ten days after the debtor gets possession of the equipment.

BY MR. GILMORE:

That's the document which is described over in the 400 series, particularly in 9-402?

BY MR. BRAUCHER:

Yes, sir.

BY MR. GILMORE:

Is this the only piece of paper that they are going to have to have?

BY MR. BRAUCHER:

No, it is not, but this one must come within the ten-day period if you are going to preserve a purchase money position. It must happen before you are perfected against third parties.

Now, you wouldn't have to use this under the statute. You could use your security agreement, what you now call the chattel deed of trust, not only as a security agreement but also as the financing statement. You can file the document itself or you can file the short form. On the whole, I think you're going to find your filing officers like the short form and don't encourage people to file the oversize document. This is a very simple thing to fill out. The problem is in the clause you are using to describe the collateral, and I would think that in the kind of deal that you're talking about the debtor would be well advised to insist that you describe what you mean to claim and no more.

BY MR. GILMORE:

And if you were a debtor or if you had a debtor as a client you would not encourage him to sign the sort of financing statement describing all of the debtor's property, past, present and future?

BY MR. BRAUCHER:

I wouldn't even let him sign a financing statement that covered just "equipment." This form allows you to describe the collateral either by item or by type.

BY MR. GILMORE:

Perhaps you might explain why you wouldn't allow your client to

sign a financing statement which described collateral as simply "equipment."

BY MR. BRAUCHER:

Unless the bank is in fact negotiating for a security interest on all equipment now owned or hereafter acquired, you impair the utility of anything that falls within that description for use in any subsequent financing, and if you mean only to have a security interest in a specific machine, the thing to do is to describe that specific machine the way you would today, which is to put in the serial number and description of the machine which will identify it, and put that right into the financing statement. Then you know you are only covering what you mean to cover. Any other equipment that you have now or that you get later is available for separate use for financing, it can be sold without being clogged up by having a security interest on record.

BY MR. GILMORE:

If the debtor, either because he didn't understand the situation or because he was pressured into doing so, signed a financing statement which described the collateral very broadly, let us say, as Mr. Braucher suggested, "all equipment" and at the time the financing statement is filed there is indeed only one piece of equipment lying around, so that it is obviously what is now covered. Let us assume that the next month or the next year, or year after that, various other bits and pieces of equipment come into the plant, now I take it, Bob, that this financing statement we are filing now will cover all these subsequently acquired bits of equipment?

BY MR. BRAUCHER:

If you describe by type, they are covered. If you are describing merely as equipment or some particular type of equipment, then that financing statement is adequate and remains on file. I think it's five years generally; There is no change in the Mississippi code. A financing statement will cover all property that falls within that description.

BY MR. GILMORE:

Under a broad financing statement of the type we were hypothesizing, and then assume a series of transactions involving collateral of the type described, you are saying that the first filed statement would pick up all of the subsequent transactions, the lender would not have to make a new filing with respect to each transaction?

BY MR. BRAUCHER:

Yes, this is a very convenient thing.

BY MR. GILMORE:

It's good from the lender's point of view, although bad from the debtor's point of view?

BY MR. BRAUCHER:

Well, it's good from the lender's point of view if he uses it properly. It's a very convenient thing if the bank is in fact really undertaking to provide all of the financing for this business over a period of time, if you have one little filing that you could make and that will cover a whole series of transactions, but it is to the lender's interest also, assuming he's in this business, to keep from getting things all fouled up. If you make a practice of claiming more security than you really are bargaining for, what you end up with is producing situations of conflict and confusion with other lenders which will have to be worked out at some later date. I think it is to the lender's interest as well as the borrower's interest to file precisely what you mean to file. If you mean to have a security interest in a specific piece of machinery, have your filing so that it describes that piece of machinery and does not cover anything else.

BY MR. GILMORE:

So you suggest that the description of the collateral in the financing statement should be as specific as possible, not because the statute requires it, it doesn't, but just as a matter of sound and sensible banking business policy.

Peter, I take it you agree with that?

BY MR. COOGAN:

Yes. I would.

BY MR. GILMORE:

Mr. Cohen was saying a while ago that under current Mississippi practice it would be necessary to describe these machines in a deed of trust by serial number. Would you think that would still be necessary or still desirable?

BY MR. COOGAN:

It would still be desirable. Due to the fact that in Bob's answer he is assuming that the security agreement had an after-acquired property clause that the mere existence of a financing statement which talked about equipment would not necessarily pick up on this particular agreement.

BY MR. BRAUCHER:

I think before we leave the financing statement there is one qualification we ought to make clear. We are talking here I hope about loose equipment. This is loose equipment, stuff you can pick up and carry around. It is not cemented into the building. It has not become by affixation real estate. We can say a few words about what happens in real estate under the fixture idea later.

BY MR. GILMORE:

Well, Peter, Bob was talking about financing statements.

BY MR. COOGAN:

That is right.

BY MR. GILMORE:

The document described in 9-402. You have now introduced the term "security agreement."

BY MR. COOGAN:

That is right.

BY MR. GILMORE:

Is that a different piece of paper from the financing statement? You might go into the security agreement.

BY MR. COOGAN:

The security agreement is distinct from the financing statement. The financing statement is a piece of paper which merely gives notice that a person who is or may become a debtor may become obligated to another person who is now or may in the future become a secured party with respect to an indebtedness that either now exists or may be created in the future. It actually gives you no actual information as to the present

state of the indebtedness or the collateral running between the debtor and the secured party. It's the type of filing that has been used heretofore only with the Uniform Trust Receipts Act, the various accounts receivable statutes and the so-called Factor's Lien Act. It is very different from the kind of paper that is filed with respect to the conditional chattel mortgage or the conditional sale where the conditional sale required recording.

This is one of the elementary traps that I hope Mississippi will escape. I hear stories from bankers in large cities who go around to their small town correspondents and find that somebody has a whole drawerfull of financing statements which he wants the big bank to take participation in. Counsel for the big bank says, "Well, I'd like to see the security agreements," and the small town banker says, "What do you mean by security agreements? I just gave them to you."

Well, the financing statement is not a security agreement. What Bob Braucher has said about how generally you can describe the property with respect to the financing statement most definitely does not apply when you come to describing the collateral with respect to the security agreement itself. In other words, there must be evidence that there is a contract between the debtor and the secured party, and you have to describe the type of collateral that the parties intend to cover and the type of debt the parties intend to cover. The security agreement can be very simple. It must be signed by the debtor.

BY MR. GILMORE:

The security agreement you can find described or explained in 9-203.

BY MR. COOGAN:

The financing statement according to the code must be signed not only by the debtor but also by the secured party. None of us can quite remember why we allowed that requirement to go through, but nevertheless that is the requirement of the code. There are reasons for it, but they are not very cogent.

BY MR. GILMORE:

Then there are two pieces of paper: (1) the financing statement which goes into the public files, which has to bear two signatures, the secured party and debtor; and (2) the security agreement which needs be signed only by the debtor.

BY MR. COOGAN:

Now, the description of the collateral need not be by serial number, as was the law in many states with respect to many types of security agreements in the past, but it must be reasonably identifiable as described. A person ought to be able to figure out just which machines are covered and which are not. If all machines are covered of a certain type then a fairly general description can be adequate, but if you intend to cover only one red Chevrolet truck, 1967 model, it ought to be possible for some person to identify that red truck from information that's given in the security agreement.

BY MR. BRAUCHER:

Grant, could I make a correction, now that we have the security agreement? I said that you could file your chattel deed of trust or your security agreement instead of the short form of financing statement, but that's only true if the security agreement meets all of the requirements of a financing statement, and people have gotten into this trap by having one that's signed only by the debtor and taking that down and filing it, and they haven't got a valid filing because they haven't met the requirement that the thing be signed by the secured party.

BY MR. GILMORE:

Because we have the papers drafted, we want to know what to do with them. We have two pieces of paper then. We find outstanding litigation throughout the country in which people have fallen into traps at this point, not getting the two pieces of paper. The code formal requisite provisions are on the whole much simpler than under the precode statute, but they do exist. You can save yourself and your clients a lot of grief and trouble and the supreme court of the state a lot of work if you do get these two pieces of paper. Find out what they are required to be, one a statement for the file, a financing statement, and the other the agreement between the parties, referred to as security agreement.

And, Peter, except for the debtor's signature and the description of the collateral which you say for business reasons ought to be fairly specific, that's all it has to have, no other formal requirement?

BY MR. COOGAN:

No other formal requirement.

BY MR. GILMORE:

I suppose in a normal case the security agreement would in fact contain a great deal more than that?

BY MR. COOGAN:

Yes, ordinarily a security agreement would contain probably some sort of representations as to ownership, representations as to the absence of default under any other agreement, and representations as to the absence of any encumbrance. You may or may not have elaborately drawn default clauses. Under the old law these were more necessary than they are under the new, because whether or not you provide for the remedies that are given in Part 5 of Article 9 you are entitled to make use of any of them. I would suppose that most lawyers still want to draft the default and remedy clauses in some particularity so that they are assured that they have incorporated whatever to them seems important on this particular kind of transaction.

Article 9, Part 5, says that you have the remedies that are given in Part 5, but you also have the remedies that are spelled out in the security agreement. They are additional; therefore, in most cases you will have a remedy section as you have had in the past.

BY MR. BRAUCHER:

Grant, I think it might be useful at this point to refer people to the documents that were distributed in the file of documents. The equipment form of security agreement is the second one in your file. It's called Mississippi Bankers Association U. C. C. Form Number 2. It has all the things Peter was talking about and includes one item which a lot of people have agreed is about right. The commercially reasonable time for sale is agreed to be five days, which is a helpful little note of certainty added to what is commercially reasonable. That's one of the last things on the back of that form.

BY MR. COOGAN:

Suppose, however, that five days were not in fact commercially reasonable?

BY MR. BRAUCHER:

Then it would not be any good.

BY MR. GILMORE:

The judge will some day decide whether five days is or is not commercially reasonable.

BY MR. COOGAN:

To go back to the degree to which we need default provisions or remedies, the parties can sort of write their own bylaws, and if their bylaws are reasonable, the bylaws will be effective. By bylaws I mean standards that will be applied such as the one that Bob Braucher suggests, the five-day period.

BY MR. BRAUCHER:

The statutory section to which we are now referring is 9-501. Parties may agree to definitions of what is commercially reasonable. Unless the terms are manifestly unreasonable the agreement will prevail. It does add some certainty. I think the general agreement around the country has been that five days for notice is in general a pretty reasonable thing, if we are not dealing with something that is perishable or something like that.

BY MR. GILMORE:

Let me say just a word about the Article 9 provisions on after-acquired property and future advances. Under Article 9 a secured party can take and perfect an interest in his debtor's after-acquired property. There is no requirement, as under much precode security law, for filing, at the time of the acquisition of the property, a supplemental mortgage or deed of trust. Under Article 9 after-acquired property arises full-fledged as a wholly legal as distinguished from a merely equitable interest. This results from the provisions of 9-204, subsection (3).

The code also takes a very liberal approach toward arrangement for future advances. You find this in 9-204 (5). If you plan to claim after-acquired property or if you plan to make future advances, these things should go into the security agreement, not in the financing statement.

We have these papers drawn up now. We know that in order to perfect our interest we have to file. Where do we take this financing statement, what do we do with it, Mr. Cohen?

BY MR. COHEN:

Depending on the type of collateral, you take it to the chancery clerk's office, as you did before with the chattel mortgage as to consumer goods.

BY MR. GILMORE:

Well, let's see, we will hypothesize industrial equipment.

BY MR. COHEN:

You would take it to the chancery clerk's office and file your financing statement, and also send a copy to the secretary of state for filing there.

BY MR. GILMORE:

Let's see, this is 9-401, subsection (1) (c)?

BY MR. COHEN:

That's correct.

BY MR. BRAUCHER:

Could I make my correction now? This is in the forms that have been distributed. This is U. C. C. Form 2: it says that this form is to be used for dual filings, and that's what we're talking about, dual filings.

BY MR. COHEN:

Both U. C. C. 1 and 2.

BY MR. GILMORE:

This being industrial equipment, it would fall under subsection paragraph (c) of 9-401 (1). That requires filing in the office of the secretary of state, and then, as I read this, if the debtor has a place of business in only one county of the state you must also file in the office of the chancery clerk of the relevant county.

BY MR. COHEN:

If he has a place of business in only one county we make two filings, and if he has a place of business in more than one county, then you only file in the office of the secretary of state.

BY MR. GILMORE:

So if you have a debtor doing business in several counties then you need make only the one filing with the secretary of state. No local filing at all is required.

BY MR. COHEN:

Yes, sir.

BY MR. GILMORE:

But if it is a local business operating in only one county then it requires a double filing. If you miss on either of the two required filings I assume your interest would not be properly perfected if you are in doubt against a trustee in bankruptcy, and so on.

BY MR. BRAUCHER:

Could I make two qualifications on this? We have been talking about industrial equipment. If there is no place of business in the state you have another provision about filing at residence, and that can get you sometimes into multiple filings. For example, if you have a partnership it's a little hard to tell, you have to go where the partners reside, I suppose.

BY MR. GILMORE:

Bob, we have been hypothesizing industrial equipment, machinery in a factory. Let's assume it is still industrial equipment, but of the type that moves around, for instance, harvesting machinery, road-building machinery and that sort of thing. Any special filing wrinkles if we change the type of equipment this way?

BY MR. BRAUCHER:

If you are talking about harvesting equipment, I think you have got equipment used in farming operations, and there you have (1) (a) of 9-401. You don't have to file in the secretary of state's office. You do have to file in the chancery clerk's office in the county of the debtor's residence, or if the debtor is not a resident of the state, then in the office of the chancery clerk where the goods are kept.

BY MR. GILMORE:

Suppose we are dealing with this mobile equipment owned, let us say, by some enterprise that is doing business not merely in this state but a number of other states?

BY MR. BRAUCHER:

Well, then you go back to 9-103. As to mobile equipment you are

in subsection (2) of 9-103, and there you take the chief place of business of the debtor in order to choose your state.

BY MR. GILMORE:

Well, let's see, we have the equipment of this sort, mobile equipment, and let's say the debtor operates both in Mississippi and Alabama.

BY MR. BRAUCHER:

You have to determine the chief place of business.

BY MR. GILMORE:

Let's assume that is Alabama.

BY MR. BRAUCHER:

Then you would proceed according to Alabama law.

BY MR. GILMORE:

You would not file at all in Mississippi?

BY MR. BRAUCHER:

No, no need to file in Mississippi.

BY MR. GILMORE:

Even though the equipment itself is in Mississippi, is always in Mississippi, and never leaves Mississippi?

BY MR. BRAUCHER:

Yes, because the Mississippi statute says that if the principal place of business is not in this state, the law of the jurisdiction where such chief place of business is located shall govern.

BY MR. GILMORE:

In this sort of situation Mississippi law, with respect to filing perfection, accepts the law of the chief place of business state as operative in Mississippi. Now, this is important not merely with respect to where you file if you are dealing with this sort of multi-state enterprise and this sort of equipment, but what files should you check if you are trying to determine to what extent the existing property is encumbered. So

with this sort of equipment in Mississippi you might well find an Alabama filing, or for that matter, a New York filing controlling, so you would have to determine in this sort of situation, which state is to be regarded as the chief place of business, both for the purpose of making your own filing and for the purpose of checking other possible filings which will be accepted as controlling in Mississippi.

BY MR. BRAUCHER:

There is an exception in 9-302, subsection (5). We have been talking about equipment of an industrial enterprise. There are certain enterprises that have a special rule. In general they are what are called transmitting utilities, and the problem there is where their property is spread all over you have a special filing provision there, and what we have been saying would not be fully applicable if you have a transmitting utility.

BY MR. GILMORE:

In the world as we know it there are, of course, not only lawyers and bankers and businessmen and enterprises and industries, there are also poor benighted people, strangers and afraid in a world they never made, known as consumers, and consumers do make their appearance in this so-called Commercial Code. Consumers have a bad habit of borrowing money from banks, who providently lend money to consumers and take security interests in the consumer's goods, automobiles, television sets, whatever he may have that the bank would like. So I think before going on further in the world of commerce and industry that we ought to say a few words about each one of us in our other capacity in life of being a consumer.

Bob, would you like to enlighten us a little bit on consumers in Article 9?

BY MR. BRAUCHER:

If you bear in mind what we said about this industrial equipment, a good deal of what we said is also applicable if you have a consumer goods transaction.

BY MR. GILMORE:

We were talking earlier about something we called equipment. Now you bring in another term, "consumer goods." These are both, are they not, defined terms?

BY MR. BRAUCHER:

That's right.

BY MR. GILMORE:

We find definitions of them in this first part of the Article, 9-109, which tells you about four different classes of goods, differentiated principally according to the use to which they are put. The equipment used in the business is equipment. Goods used primarily for personal, family and household purposes are what Professor Braucher was referring to as consumer goods. These are defined terms.

BY MR. BRAUCHER:

Right. And let's take the automobile, just so we will think of something specific. If the automobile is used or bought for use primarily for personal, family or household purposes, then under 9-109 it is consumer goods. If it is consumer goods, it is subject to 9-401 on filing, in a little different way from what we were talking about. Consumer goods are in (1) (a) of 9-401, and that dispenses with any secretary of state filing. All you have to have then is the local filing in the county of the debtor's residence, or if he's a nonresident where the goods are kept.

BY MR. GILMORE:

Suppose, Bob, you have a doctor's car and he uses it partly in his practice and partly for whatever doctors use a car for as a consumer.

BY MR. BRAUCHER:

If it was a doctor's car, there's a chance that it turns out to be used or bought for use primarily in business. If that's true, it's equipment, and if you don't know which it is, you'll have to comply on the theory that it is one, and then you will comply on the theory it is another.

BY MR. GILMORE:

And how would you file?

BY MR. BRAUCHER:

And I would say you would file both under (1) (a) and under (1) (c). You probably would get away with two filings in most cases. The secretary of state filing would still be needed under the possibility that it might be business equipment rather than consumer goods.

BY MR. GILMORE:

Suppose the doctor uses the car just for his own pleasure, then you make a local chancery clerk's office filing under (1) (a) 401, and then he switches that car and uses it exclusively in business?

BY MR. BRAUCHER:

That is 9-401, subsection 3, and it says that if the filing was right when you started out you don't have to do any refiling because of a change in the debtor's residence or place of business or the location of the collateral or its use. So a change in use does not change the filing.

Now, I've been talking about a motor vehicle because motor vehicles are subject to other laws. There is a motor vehicle finance act in Mississippi, and my understanding is that it has its own filing requirements. We should get our Mississippi people to answer this, but I think you may have to comply both with the filing provisions of the motor vehicle finance act and with the filing provisions of the Commercial Code.

BY MR. GILMORE:

Now, is that the way that would work out, Mr. Stengel?

BY MR. STENGEL:

I think that is true. Under section 9-203 we find the provision that the transaction, although subject to Article 9, may also be subject to the Motor Vehicle Sales Finance Act, and if so, the provisions of the Motor Vehicle Sales Finance Act would prevail if there is any conflict with the U. C. C.

BY MR. BRAUCHER:

But if the motor vehicle act requires one filing and the code requires another filing, I don't see anything inconsistent about that. You can do both filings.

With other consumer goods you look at section 9-302. 9-302 (1) (d), covers a purchase money security interest in consumer goods. You don't have any filing. The theory was that on conditional sales of goods such as refrigerators, air conditioning, television sets and household furniture, a lot of people simply ran on luck rather than filed. The utility of it was not enough to justify the filing expense. That means your security interest is perfected without filing, but you do run a risk that the consumer debtor will sell the television or whatever to his next door neighbor. That's 9-307 (2).

In the case of consumer goods a buyer takes free of security interest if it is not filed, if the buyer, that's this next door neighbor, buys for his own personal family or household purposes. Now, with that exception, there doesn't need to be any filing then under the old-fashioned conditional sale of consumer goods other than fixtures or automobiles. I have heard some complaints about this because the people who are getting hung on it are small loan companies, because there is no way, no public record the small loan companies can go to see whether the furniture has already been bought on essentially a conditional sale, so that they have to rely on the debtor's honesty. Sometimes in the small loan business that is not always as reliable as you wish it was.

BY MR. COOGAN:

This is a problem that has always existed, however. As I understand it, there was no filing generally for purchase money security on conditional sales in this state prior to the adoption of the code. You did have the peculiar rule about a three-year period, am I not right, Mr. Cohen?

BY MR. COHEN:

It was effective for three years without filing.

BY MR. COOGAN:

So this is just a continuation of the risk that has existed before.

BY MR. BRAUCHER:

There is one other thing that needs to be corrected. In the consumer goods case there is a limitation on coverage of after-acquired property. That's in 9-204, and in general it's limited to property acquired within ten days after the loan.

BY MR. GILMORE:

So you say it is a specialized provision relating to perfection. The idea is consumer interests except automobiles and fixtures can be perfected as against those people without a filing requirement, but there is a permissive filing requirement which you can take advantage of that will protect you against even the people mentioned in 9-307 (2). The place for filing consumer agreements is always local. Financing statements covering consumer goods are filed in the county of residence in the chancery clerk's office, not with the secretary of state as in the business of commercial financing.

The original drafting of Article 9 included a full dress treatment of all of the manifold requirements of the consumer and his unhappy world. That was eventually abandoned, principally because at that time more and more states in the late 40's and early 50's were already passing detailed statutes regulating consumer financing, either restricted to automobile finance or covering the whole consumer finance field generally. It was decided, therefore, to abandon any comprehensive treatment of consumer problems in Article 9, and the present state is that just a few odd bits and pieces of the original draft have survived, such as the provision Professor Braucher referred to in 9-204 limiting the scope of after-acquired property interests in consumer goods.

There are a few special consumer provisions in default. You can't proceed quite as freely as the foreclosing lender with respect to consumer goods as you can with respect to other classes of goods, but in general, consumer agreements fall under Article 9 like all other agreements in personal property. There is no special treatment of consumers except a few odd bits and pieces which probably should have been deleted but survived from earlier drafts. The perfection of the consumer is like the other statutes which are expressly not repealed, as your automobile finance act, and with which Article 9 must somehow continue to co-exist.

Now, coming back to the business world, we were talking at some length about financing on industrial machinery. We were talking about loose industrial machinery you can pick up and carry around. Sometimes, as we all know, machinery and other things get so built into the factory or the house that in contemplation of law these former chattels become part of the real estate. We describe them precode and in Article 9 as fixtures. Now, no meeting like this would be complete if we did not hear Mr. Coogan deliver his tragic lecture on the subject of fixtures. Mr. Coogan can be very frightening about fixtures.

BY MR. COOGAN:

Before I go into fixtures I might take the typical simple equipment financing without any complications of fixtures, and then contrast the fixture problem with the simple transaction.

Let's say that a manufacturer needs to borrow five thousand dollars. What is the simplest possible way by which he can give security from both his standpoint and from the standpoint of the bank that is going to lend him the money?

If he is in an average situation, at least part of his money is likely to be used for the acquisition of some new machinery, some new pieces

of equipment. If you can shape the transaction in such a way that you have the successor to the old-fashioned conditional sale, it is difficult to make a mistake unless you really work hard at it. In the first place, the purchase money security interest takes free of anything that may be disclosed by the record, provided only that the purchase money security interest is filed within ten days after the time that the debtor receives possession of the goods.

Now, if your transactions can be confined to purchase money transactions, you don't need to know anything about the priority rules of the code at all except the rule that says that the purchase money man who has equipment as collateral gets first crack at the collateral, regardless of the existence of previous filings and the existence of after-acquired property clauses, provided only that he does two things. First, he sees that his money is used to pay for these goods so there is no question that he has a purchase money security interest. If he supplied the goods that's *ipso facto* proof. If he didn't supply the goods, if he is a banker, he still could get the advantages that went with the conditional sales by making sure that his money is actually to pay for these particular newly acquired goods.

Now, how do you do this? Almost any piece of paper that expresses the agreement of the parties can be an adequate security agreement. It need meet no formal requirement except that it has the signature of the debtor and it describes the collateral in reasonable detail. This need not include serial numbers if you can identify it in some other way. The security agreement obviously must be in writing.

Now, what do you do after you have this piece of paper? You can do either of two things. You may file a copy of this security agreement as your financing statement. If you are going to file this as your financing statement, you have to add two things: the address of the debtor and the name, signature and address of the secured party. The name and address of the secured party ordinarily would be found in the security agreement but this need not necessarily be so. Now, where do you file? If this is a business that has only one plant, you file first in the secretary of state's office, and second you file in the county office.

Now, let's see why we have this division. It is often necessary for credit agencies and for lending banks to determine the credit standing of businesses that are not established right in the neighborhood, and very frequently a business will have not one plant in one county, but one plant in this county and another plant in another county. It is much more convenient, by and large, for the information with respect to business entities, business borrowers, to be centralized in the secretary of state's office.

Now, why then do we have any local filing? If this business has no other location, most of its trade creditors will be right in the area in the county, so that we have county filing. Supposing, however, that the business has more than one filing, which county do you choose? The answer is simple. You don't choose any. If you have no particualr reason to favor local filing in this particular county there is no local filing. So these rules are really quite simple. You must really try to make them complicated if you are dealing with a purchase money situation.

Now, let's say that part of this loan is going to be secured by presently owned collateral. With respect to the presently owned collateral we have an additional job. This is not new with the code at all. This is always true. You have to find out whether or not the collateral that's being offered to you is really owned by the debtor. If it is not owned by the debtor obviously it's not going to do you much good as collateral regardless of how good your paper may be. How do you find out? If this is near the time when there could have been a security interest created under the old law, obviously you are going to have to check as to whether or not there are either conditional sales, chattel mortgages, or chattel deeds of trust in existence on this particular piece of equipment. You check just as you have checked in the past.

Supposing this exists six months after the code has gone into effect, you will also have the possibility that there could be a security interest created under the code. The code filing rule is a little different than the filing rules under the old law, at least with respect to simple transactions. We have always had the problem of notice filing with respect to trust receipts, particularly accounts receivable. That's the only kind of filing that you can have. That is a general notice that one particular person either has or may become a debtor and the other person either has become or may become a secured party, and it's up to you to find out from the parties themselves whether or not any actual security interest is in existence. If it is, then you will have to meet that situation depending upon the facts that you find. Let's say, however, that there is no security interest in existence, but there is a filing. The code provides the method by which the debtor can demand that the piece of paper be removed from the files. The termination statement will be filed, and thereafter I now become the first party on record; therefore, I am entitled to priority as to the types of equipment that I have covered with respect to this kind of collateral. Under the first to file rule, where two security interests are perfected through filing, the one that is perfected through the earlier filing has the earlier priority.

These rules are a little bit complicated, although not really as complicated as the rules of poker or bridge. If you have ever learned to play

poker or bridge you surely can learn the priority rules set up by the code. It's mostly the fact that we use new terminology.

The financing statement is this piece of paper that is supplied by the printing establishments, and really all you do is follow the directions on the form. In most cases you will file the financing statement.

This type of transaction is handled by clerks day in and day out with no difficulty whatsoever in a great many states of the union. It takes a little time to figure out just how to do it, but the directions in 9-401 are reasonably clear. The directions on the pieces of paper are reasonably clear. There are no tricks as to what the security agreement itself must say. Anything that expresses the deal of the parties generally is adequate to serve as the security agreement, provided only that it describes the collateral and is signed by the debtor.

This is a typical transaction. A great many transactions are handled through the purchase money technique. Practically all new equipment is financed in this way, and it's as easy as it can be to perfect that kind of a security interest.

The other type has the additional problem of making sure that you are getting the interest that you think you are going to get. Now, in Mississippi you have this additional problem that possibly you have to do more searching for judgments, and here I think the amount of money involved is likely to result in a rule of thumb. If it is under so much, you will probably take a chance. Judgments against debtors are not too common, and the situation where you have a competing judgment lien just arises so infrequently that we can't find very many cases in the books as to just what happens. But you do happen to have a case in Mississippi that at least puts you on notice.

Now, let's add a few complications. I always knew that the people of Mississippi were very polite, but I didn't know how polite they were going to be. After we drafted the sections on fixtures, we realized that we had made some mistakes, and in some cases that we were not as clear as we should have been. Well, Mississippians could very probably have been critical of us for not having seen some of the problems that we didn't answer, but they were like the Queen, who was entertaining a native from Africa who was a little nervous in the presence of the Queen, so nervous that in fact she broke a teacup. The Queen immediately managed to break not only her teacup but also her saucer. Well, I would say that Mississippi has treated us that way with respect to fixtures. If we made some mistakes as to fixtures, Mississpipi has made twice as many.

In the first place, our beginning problem is: what is a fixture? Is this a fixture (microphone)? I suppose not, because while it's connected

to the floor over here, or to the wall, the connection is so easily pulled out that we'd say that this is personal property, so the ordinary rules with respect to personal property would apply. But how about the air conditioning equipment? A person who is interested primarily from real estate law says, "This air conditioning equipment is just as much a part of the building as the bricks in the walls. I can't really use a building in the south without air conditioning equipment, so I think I as a real estate claimant have some right to look at this air conditioner not as a former chattel, which it was, but as a piece of equipment which has now become real estate, and I ought to be able to find out anything about any liens and encumbrances upon this piece of property by looking at the real estate records, not be held to the records as to personal property, because this is no longer personal property."

Well, you have cases that decide that air conditioning is a fixture, and you have cases that decide that air conditioning is not a fixture, so you can take your choice. In fact, we have a beautiful case in Massachusetts which involves not an air conditioner but involves refrigeration. In the days when refrigeration was connected with pipes to a motor that was in the basement, the same vendor installed the same piece of equipment in two apartment houses about three blocks apart. In both cases the person who bought the equipment was unable or unwilling to pay for it and it was necessary for the finance company to begin to take steps to get back the equipment. In the first case—and this was the same finance company and the same vendor, the same finance company and the same piece of equipment, installed in the same way—the jury solemnly decided that this had been so installed that it had become part of the real estate, and therefore it could not be removed. In the second case, the jury in its wisdom decided that this had remained personal property, and therefore it could be removed.

Now, what's a poor lawyer going to do? It has been my contention that in the code when we approached this fresh we should have been smart enough to have answered at least the elementary questions as to whether the most common types of this mixed realty-personalty go under the code rules or whether they go under the real estate rules, or whether they are straight personal property. We did that to some extent. We said that regardless of the fact that the bricks over there at one time were in somebody's building supply yard where they were straight personal property, that once they became incorporated into that wall, those bricks and building materials and the like became a part of the real estate. If a security interest existed in them before, it was just too bad, that security interest was lost, they now had become part of the real estate, and whoever had a claim to the real estate had the prior

claim to those bricks or building blocks. However, we didn't go on to say that air conditioning is or is not a fixture. We didn't go on to say that the furnace is or is not a fixture. There we left it to the law of the individual states, on the assumption that in most states the answer was reasonably clear.

We have put on this program in a great many states and we have yet to find a lawyer who said that in his state the law was a bit clear as to what was and was not a fixture.

Under the original version of the fixture provisions we started to make sense out of it and started then to read it backwards. You started to do that with the Mississippi version, but I find that the last section, subsection (5), has been omitted completely. Subsection (5) was the section which gave the right to remove equipment.

Subsection (5) has been completely eliminated, so that while you can have a fixture security interest as far as the code is concerned, there is nothing that tells you what to do with it in the Mississippi version. Mississippians made one other important change. In the code as originally adopted, we followed the policy that is undoubtedy the policy of most states, and which I understand had been the policy in Mississippi prior to the adoption of the code, namely, that once you define a piece of property as a fixture, a person who contributes that to a building that he doesn't own and who is unpaid may on the default of the person who bought that fixture remove it, provided in the code that he pays the cost of any damage that he does in the course of removal.

The question of who can remove was answered by subsection (2) and subsection (3). Subsection (2) says that if the security interest attached prior to the time that the goods became a fixture that the prior interest in the real estate acquired no interest in that fixture or they acquired an interest subordinate to the rights of the person who supplied that fixture to remove it in the event that he wasn't paid for it. That section has been changed in Mississippi to say that he can do so provided that he gets the consent of anybody who holds a present interest in the real estate.

In other words, I suppose that if I had the consent of the person who owns this building or who had a mortgage on this building I could have a perfectly good agreement to take out the chimney, or I could have a perfectly good agreement to take out the wall, so that you can always do this sort of thing with consent. The whole purpose of the fixture provision was to say that if you come in this category which under the law of that state was determined by jury, or however you determined it, was a fixture, and that security interest in that fixture was created before that fixture became part of the building, that it can be

removed. This was to permit the financing of additions without getting the consent of the real estate interest. This rule has just completely turned topsy-turvy, so that you really have very little left to the fixture provision.

The standard version of the code in the fixture section said that if, however, a fixture has already become part of the real estate at the time that the security interest was created, then the only persons that the fixture man can perfect himself against are those who acquired an interest in the real estate at a later time. In effect, what we have done, what Mississippi has done, is to say that whether you acquire a fixture security interest before or after attachment, you take it subordinate to the interest of anybody who claims an interest in the real estate.

I think that's a mistake! I understand that it was enacted as part of the compromise that was necessary to get the code through, but I would hope that at some point it would be reconsidered. I don't think that the basic philosophy of 9-313 is wrong. I think it is right. There are a few changes that I'd like to see made, by way of clarification, not by way of a change in policy, but generally the real estate financers are not equipped to handle a great majority of the little transactions that take place when appliances are added to a building. The problem is complicated by the fact that we are so uncertain as to what the courts will decide is a fixture. It has been my opinion for some time that while we can't make a perfect definition we ought to be able to limit at least the area of controversy here. I will stop at that point, Mr. Moderator.

BY MR. GILMORE:

Well, it is a shame that the entire audience here has not been able to hear Mr. Coogan's full speech on fixtures.

I think, Peter, that the Mississippi version of 313 makes you even sadder than the Uniform version.

BY MR. COOGAN:

That's right.

BY MR. GILMORE:

I never thought I would live to see the day that anything could make you sadder than the Uniform version. Now we have achieved that miracle.

BY MR. COOGAN:

I would be sadder if I were a supplier of air conditioning or other

articles that might be fixtures in Mississippi. Actually I don't sell anything in Mississippi that might be fixtures.

BY MR. GILMORE:

If you were a real estate mortgagee in Mississippi you would be very happy.

BY MR. COOGAN:

Well, I don't know that I would. That's where I think the real estate mortgagee may have overshot the mark. I don't think that the typical real estate mortgagee wants to be bothered every time that some item may be added to real estate that is part real estate, part personal property in nature. I think this is a case where two streams of law come together, and it's the natural place for adjustment of the two sets of interests. I think the adjustment that was made by the original 9-313 in philosophy was correct. My objection to 9-313 as originally drafted was not to the philosophy at all, but to the fact that it didn't go quite far enough in making it clear what it was talking about.

BY MR. GILMORE:

Well, we will find out next depression time how happy the real estate mortgagees are actually going to be in Mississippi. As long as land values remain stable or go on rising you never get litigation involving this particular conflict between a chattel financer in fixtures and a real estate interest also claiming his interest in the fixtures as real estate. So long as the values of the land remain stable or go up there is always enough money to pay off the chattel man, so you never get to the point involving possession in conflict with the real estate interest. This is a problem which emerges in litigation only in times of a sharp decline in land values. The last real bout of litigation was during the 1930's, spilling over into the 1940's, so, as I say, we will find out who shall be happy and who shall be sad in this context next depression time and not before.

I commented at the beginning of the session that what sounded so revolutionary about Article 9 is that it starts off by abolishing all the existing security devices. So from now on until next March thirty-first we will be living with chattel deeds of trust and conditional sales and trust receipts and assignments and accounts receivable and pledges, etc. After March thirty-first, beginning on April Fool's Day, all those will cease to exist, and the only thing there will be in Mississippi is the Article 9 security interest that we have been describing.

We assume that on March thirty-first you will have in your office stocks of old forms, stocks of contracts, conditional sales, whatever you call them in Mississippi, deeds of trust, trust receipt arrangements, and one thing we should think about is must you throw all those away on March thirty-first and have a whole new stack of Article 9 security agreement forms ready to start using on April the first.

Mr. Cohen, what would you do?

BY MR. COHEN:

I notice that the Mississippi Bankers Association forms are all labeled at the top "Security Agreement." Of course that's not necessary, you can still continue to call them whatever you want to. They say that the debtor grants the bank a security interest in the following goods. You could still use your conditional sales form and retain an interest. You can still use all your old stock of forms. The only thing that there is any material conflict in are the provisions in regard to remedies in default. Some of the provisions in the usual conditional sales contract might not be valid methods of enforcing the security interest.

When we come to the chattel deeds of trust, I have a little bit more doubt there. There we have a third party interposed there, the trustee. Of course, the trustee doesn't have anything to do under the Uniform Commercial Code. I really haven't studied the default provisions to see whether the trustee could as an agent carry out the default provisions and still use the chattel deed of trust form.

BY MR. GILMORE:

Obviously, Mr. Cohen, I am certain the draftsmen were not thinking of Mississippi's deeds of trust. The definition of who is a secured party, which you find in 9-105 (1) (i) points out that when the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party. So I would assume that perhaps by accident the secured party definition would fit into your deed of trust practice.

BY MR. COHEN:

Actually, other than saving a little money in using up your old forms, I don't see too much purpose in using the old forms, since the new forms, copies of which are here, are very satisfactory. Of course, in certain instances you may want to make special provisions, and in those cases you might want to use different forms.

BY MR. GILMORE:

Well, I take it that you would not be thinking it wrong if on April first or second or third you went ahead and used one of your old forms.

BY MR. COHEN:

No, sir.

BY MR. GILMORE:

Still call it anything, a trust receipt arrangement or chattel deed of trust or conditional sale, the only thing that would have happened would be that in any transaction entered into following on and after April first, the transaction, whatever called, would be subject to the Article 9 rules but not to the rules applicable to pre-code devices.

As Mr. Cohen was saying, it is certainly a part of sense and wisdom to move over to forms prepared specifically for Article 9 which take advantage of the article's permissive provisions, but there is certainly no requirement that you must do so on April first or on any other day. Indeed, in the cases that have come up in the states under the code in the early years nothing is more common than to find that the parties were going on using their old arrangements, referring to their transactions by the old names, trust receipt, chattel mortgage, and whatnot, so from the point of view of what form you use, April first is not a date of any particular significance, except that you must keep in mind with respect to transactions entered into after the code becomes effective, there must be both the public record of the so-called financing statement as well as the private agreement between the parties, the so-called security agreement. Your old forms will do very well as a security agreement under the code provided they meet these simple formalities and are signed by the debtor. After April first in separate transactions that occur there will, of course, have to be in all cases a code filing and a code financing statement.

BY MR. COOGAN:

Grant, may I have a word there? I think there is a little advantage to the continued use of the old forms for a long enough period of time to enable the bar to become acquainted with the code. The danger with the new forms is that some overambitious lawyers begin to take in everything but the kitchen sink and all of the after-acquired property when you really don't need it.

In general if there wasn't a reason for taking a blanket lien before the code there isn't too much of a reason for taking a blanket lien now.

If you are not accustomed to handling inventories or accounts receivable I think you should be very slow in creating security interests on the basis of inventory or accounts receivable under the code. You can do it more easily, but from the standpoint of a credit judgment a lien upon a specific piece of machinery, say a metal turning lathe, is still a darned sight better quality than a security interest in say a bale of cotton which is going through the process of being changed into cloth. A whole new set of credit considerations comes into play in making this switch. I think those considerations should be thought through very carefully before one changes from an old-fashioned system like a chattel mortgage deed of trust or conditional sale to the newer-fashioned inventory lien which generally has been used only by a handful of specialists. I'll bet that in most states there are not a dozen lawyers who are thoroughly acquainted with the use of the Uniform Trust Receipts Act, and that's about all that they need.

In many, many states where I have talked to lawyers I have found good lawyers who have never used the inventory lien. Well, if you never used it under the old law the chances are that you are not going to need it right away under the new. Give yourself a little chance to get acquainted with the working of the act in its simpler forms before you jump into the complicated forms. Most of the complicated priority problems arise not with respect to the old types of chattel mortgages, conditional sales types of transactions, but with the use of inventory and accounts receivable and contract rights as collateral. Many good lawyers have never used them and there is no reason why they should.

BY MR. GILMORE:

And every reason why they shouldn't.

BY MR. COOGAN:

Yes.

BY MR. BRAUCHER:

Grant, I have wanted to put in a plug for some time. I think maybe this is the time. We are talking about transition. There are two things in the situation of transition that occur to me that I think have not been fully taken care of yet.

One is that come March thirty-first, the secretary of state is going to receive a lot of mail if he hasn't received some of it ahead of time. In most of the states where this code has gone into effect there has been some arrangement whereby people were mailing things in, say,

five or six weeks before the effective date, and then you can start out at the opening of business on the effective date with everything in order. I think that the first state that enacted the code was Pennsylvania, and they didn't do that, and it took them about a year after the opening date before they got that office straightened out. Now, that's a little problem, and it's just a problem for the secretary of state's office. I don't think we need any change in the law on that.

The other thing is that there was section 9-407, that said that the filing office was supposed to let you know whether there was something on file if you asked them. That was left out in the Mississippi enactment, and I think it ought to be put back in, because without that this filing office is a pretty difficult thing to work with. If you can't get a certificate from the filing officer that there are no liens of record, the filing system is a lot less useful, and that I think requires legislation. I think you need to have that section, and without it I think you are pretty well lost.

BY MR. GILMORE:

Let me just add a few things to what Mr. Coogan was saying about blanket liens and so on. Article 9 has often been referred to as a floating lien statute, usually by people who don't much like it. In so far as the floating lien slogan means anything, it is presumed a reference to the Article's provisions with respect to after-acquired property and future advances in 9-204, along with the abolition in 9-205 of the so-called rule in Benedict v. Ratner.[3] That is the rule which required lenders as a condition of having enforceable security agreements when they are dealing with things like inventory and receivables to police the debtor's credit. Giving the abolition of the rule in *Benedict* in 9-205 and a very conservative approach to after-acquired property interests and future advances, and the universal coverage of the article with respect to all types of personal property, it is true that under Article 9 you can, by a simple security agreement plus a financing statement, take an enforceable security interest in all of the debtor's existing and subsequently acquired personal property of whatever kind. It can be done. Nobody has ever thought that it made any sense to do it.

We think the best advice which any group of visiting experts like this one can give to any local bar with respect to the advisability of taking a complete blanket or floating lien on everything a debtor has or ever will have, which from the lender's point of view initially sounds immensely attractive, the best advice we can give them is don't. It makes no sort of sense, it's bad not only for lenders, it's bad for bor-

[3] Benedict v. Ratner, 268 U.S. 353 (1925).

rowers, it ties them up, makes it impossible for them to continue to finance their business, so that consequently the most important thing that has been said here this morning has been Mr. Coogan's advice. Our distinguished practitioner, Mr. Coogan, speaks here with immense authority. His advice is not to take the fullest advantage of these provisions. Don't use a floating lien unless you are in a situation where you absolutely have to. If you do you will not only be doing your borrower a disservice and consequently impairing your own position, you will be, as Mr. Coogan also pointed out, bringing yourself to grips unnecessarily with all of the immensely complicated priority provisions of the Article, which if you will keep your transactions simple you can largely avoid.

The difficulties of operating under Article 9 arise principally where, whether by necessity or by inadvertence, you have allowed your client to take as security not the simple stable sort of industrial equipment we discussed earlier, but to add to that all his inventory and all his receivables, with the after-acquired property feature involving future advances. Once you get in that situation you are going to have all sorts of difficult problems which you can avoid if you can stay away from it.

The best thing you can have, I suppose, is the pledge of the debtor. The next best thing is the perfected security interest in stable industrial equipment.

Now, hours ago when there seemed to be all the time in the world before us I said to myself having finished up with industrial equipment we would then go on into equally if not more detailed treatment of financing of security, inventory and receivables.

I note that we have now something less than fifteen minutes left in which to cover all the fascinating problems that arise from financing of security, inventory and receivables, once you have decided to disregard Mr. Coogan's sound advice not to monkey with them unless you have to.

Now, I think most of what we have said about setting up and perfecting an interest in ordinary industrial equipment applies, of course, to the case of the inventory and to the case of the receivables, the same requirements of security agreement, financing statement, and so on. We might briefly say a few words indicating merely the existence of problems rather than a discussion about some of the differences.

Now, let's start, Bob, with inventory. Now, with respect to the equipment, we have been assuming that once you have filed your financing statement and perfected your interest, then your interest in the equipment in the debtor's plant was good against everybody in the world. As I say, we have been assuming once the financing statement is filed, all the formal requisites taken care of, the interest in this equip-

ment is good against everybody, there isn't anybody who can impeach you, subsequent creditors and so on.

Now, coming to inventory, of course, that immediately ceases to be true.

BY MR. BRAUCHER:

Well, the big thing about inventory is that it is held for sale, and inventory is a defined term in 9-109. If it's held for sale, the way a man is going to make use of it is by selling it, and your security interest in that inventory is lost when it's sold in the regular course of business. That's 9-307.

BY MR. GILMORE:

9-307. So there is nothing you can do if you are dealing with inventory to give yourself an effective interest against the people who buy the inventory in the ordinary course of trade. Buying in the ordinary course of trade is a defined term. Once again, this is in Article 1, Definitions.

Now, when the automobiles, television sets or whatever they are are then sold by the dealer, pass out of his possession into that of somebody who is buying in the ordinary course of trade, the security interest in the automobile or television set dies.

Now, when the dealer sells these things, of course he gets something back for it. He may get back occasionally, not very often, cash, or can get back some form of promissory note signed by the buyer, with a conditional sale agreement signed by the buyer, and so on. What's the situation with respect to what the dealer receives, Bob, when he has sold off the inventory and has killed the original security?

BY MR. BRAUCHER:

Well, your security interest continues in the proceeds of the collateral (9-306).

BY MR. GILMORE:

A very elaborate section.

BY MR. BRAUCHER:

It is very complex, and this is one place where you get a security interest, for example, in cash, which is a funny sort of a concept. In filing the necessary form (U. C. C. 1) you simply check a little box which says "proceeds," and that perfects your security interest in proceeds of any character whatever. I think you can see that that security interest is

full of holes, that is, the security interest in money, for example, is going to be lost whenever that money gets into somebody's hands besides your debtor's.

Moreover, you start getting into problems, if you are talking about the inventory of a merchant, with what happens when a dissatisfied customer returns the merchandise for credit, and all of these things are dealt with in 9-306, but I think you can say that you are now dealing with something a lot less secure than a pledge of industrial diamonds or a chattel deed of trust on a metal lathe.

BY MR. GILMORE:

You tell us, as far as proceeds that come in when the thing is sold, you say the security interest shifts to them automatically?

BY MR. BRAUCHER:

It shifts automatically.

BY MR. GILMORE:

How long does this shifted interest in the proceeds continue?

BY MR. BRAUCHER:

Well, it's only good for ten days automatically, unless you have checked the little box that says "proceeds," but if you check that little box then you have a perfected security interest. You have filed with respect to proceeds of any character.

BY MR. GILMORE:

If you have checked that box on the financing statement, then on the sale of the inventory your interest automatically shifts to proceeds and continues in effect. If you fail to check the box there is still the lien shift, so to say, but the perfection remains good only for ten days, after which it lapses. I would assume that everybody financing on inventory security would always and automatically check the proceeds box. Always do so. Dealing with stuff not meant to be sold, on the whole you probably shouldn't check the proceeds box, at least I think you shouldn't, although I understand there are some lawyers who always cover the proceeds no matter what type of collateral they are dealing with. But if you are dealing with inventory you have to because the proceeds are the real collateral, what you must take to be paid. The real importance of the transaction is in making sure that you have reserved by checking the appropriate box in the financing statement your interest in the proceeds after the sale of the inventory.

Now, talking about the industrial equipment, Bob, earlier we made the point that if you found an earlier financing statement on file it didn't really bother you if what you were doing was purchase money financing, since your purchase money interest, if you qualified for one under 9-107 and perfected it at the proper time under 9-312 (4), would take priority over any pre-existing after-acquired property interest.

Now, suppose in the case of inventory in making the file check you discover one or more other lenders are already on file with filing statements covering inventory, the type you plan to deal with. Here the situation differs somewhat, does it not, from that of the collateral other than inventory?

BY MR. BRAUCHER:

Yes. In the first place, if you are not in the purchase money position you come second. The first to file wins. Secondly, even if you have a purchase money position, you are confronted with 9-312 on priorities. Subsection (3) requires that you be sure that your purchase money security interest is perfected at the time the debtor receives possession of the collateral and that you have given a notification to any competing secured party that you know about and to any competing secured party of record. There are a number of unanswered questions about the notification, but I don't think we need to go into those now.

BY MR. GILMORE:

If you find somebody on file and if your inventory financing is going to qualify as purchase money financing, you can still win. You can still get priority for your purchase money interest over anyone else, but in the case of inventory there is, as Professor Braucher pointed out, the additional requirement of notification, to all other competing lenders who have filed statements covering inventory of the type you are going to finance.

Now, Peter, you have, I believe, exactly three minutes in which to tell us all about receivables.

BY MR. COOGAN:

Accounts receivable can be very excellent collateral, far more reasonable than inventory, for the simple reason that the accounts receivable represents the stage next to cash, going through the cycle from cash to goods to a claim against an outsider, and therefore a claim that's pretty much independent of the financial health of the debtor.

The term "accounts" is defined to include claims to money growing out of the sale or lease of goods. Therefore, once in a great while you

will find that if you use the technical word "accounts" you don't include an amount of money that's due from a contract for the sale of something other than goods.

Say that you have an account with a broker, you have a loan to a broker and his right to be paid by the people who bought securities, which are not technically goods. It is much better to use the old fashioned word "accounts receiveable," which is a little broader term than the code's defined term "accounts." I'm sure that that would be interpreted by any court to include any claims to the receipt of money growing out of a sale, whether it was a sale of personal property or whether it was technically goods or not.

If you want to be very sure that what you have a right to look for in the way of money is covered, it might be well to claim not only accounts but also general intangibles. This is one of those odd results that come under the code where you have forgotten to cover the thing in the place where you should have covered it but you find accidentally that you have covered it some place else quite unintentionally.

"General intangibles" is a word that's used to described any kind of personal property which doesn't fit into one of the code's categories of goods, accounts, *et cetera*, so that quite by accident you will have some strange kinds of collateral that are covered by the term "general intangibles."

Generally, accounts financing is much easier than inventory financing. It is much easier to police, it is economically much more important, and there are probably fewer problems in connection with it.

BY MR. GILMORE:

When you were dealing with any of the categories of pure receivables, accounts, contract rights, general intangibles in the code definition, there is a requirement, perfection by filing. Filing is the only available method of perfection with respect to things like negotiable instruments and documents of title. In these things the code is the final statute across the board with respect to these pure intangible things.

Mr. Stengel, did you have a point you wanted to make?

BY MR. STENGEL:

I would like to say a word about the question that Professor Braucher raised with respect to obtaining information from the secretary of state's office. He correctly stated that we did not have that optional provision providing for getting information from the secretary of state's office. That seems to have been omitted in this state through an over-

sight. Hopefully the statute will be amended at the next session of the Legislature. However, in the meantime, the secretary of state has announced that it will be the policy of the secretary of state's office to provide information, so that if you want information you have an announcement here in the secretary of state's manual as to how you may obtain it from that office.

STUDENT COMMENTS

THE INDIGENT AND CONSUMER CREDIT

Consumer credit is basically a type of purchasing power which is advanced to individuals. This purchasing power comes into existence when a consumer acquires funds or goods for his personal use in return for a promise to pay for them in the future, thus enabling the individual to enjoy his income before he receives it.

The institution of consumer credit has become an issue of increasing national concern as more attention is directed to problems of the poor. Unfortunately for the lower-income groups, the problems of consumer credit have their source far deeper than costs and types of credit, and legislation treating those external areas is relatively ineffectual.

Ignorance appears to be prevalant at all levels of consumer credit. The legislator is uninformed as to the needs of both the credit industry and the consumer debtor, and the consumer debtor is informed neither as to the various sources of credit nor of the methods of obtaining maximum credit benefits.

An example may serve to bring some of the problems of consumer credit sharply into focus at the outset. The principal character is a low-income individual who desires to make life more pleasant for his family by the acquisition of goods on credit. Through some advertising medium he becomes interested in a dish washer which is selling at a "bargain" price. He rushes to the store where the washer is available and is convinced by the salesman that this bargain must be taken advantage of immediately since it will probably never be offered again. The consumer decides to buy it when the salesman tells him that he can earn extra money for each new customer that he refers to the company. He signs a blank contract which the salesman tells him the secretary will fill in later since the important thing at present is the finalization of the transaction. He is required to pay "nothing down," except a small amount for a credit check. Several days after signing the contract, he receives a letter from a finance company formally accepting his credit and containing a form to be filled out. He is a little wary of filling out the form because it does not set out the total amount he owes, but he signs anyway since it states how much he owes every month and the number of months his obligation runs.

A month later the washer is delivered, but does not work properly. The disturbed consumer repeatedly calls the store and finally takes time from his job to try to get a salesman to remove the defective washer. He is told that the installers of the washer were at fault and that the seller cannot take responsibility. The consumer refuses to pay and leaves the store.

After several payments are due, he receives a threatening letter from the finance company. He goes to its office and is shown the form that he had signed and returned to the finance company. The form states that the finance company is not subject to any defenses that the buyer may have had against the seller. The consumer still refuses to pay. A month later he receives another letter from the finance company stating that judgment has been entered on the note and that further refusal to pay would result in a levying against his household furnishings.

He goes to the Better Business Bureau in his community but is referred to the Chamber of Commerce. The Chamber of Commerce refers him to the Better Business Bureau. He sees no hope here, so he sees the district attorney, since he cannot afford an attorney. The district attorney thinks the problem over, decides that no criminal fraud is involved, and advises him to see a lawyer.

Shortly after this frustrating experience a sheriff arrives at the consumer's home to itemize his furniture. He calls the finance company and threatens to sue but is told that the institution is protected by the "holder in due course" doctrine. The next day a policeman arrests him for "fraudulent conversion and secreting property with intent to cheat and defraud." He is taken to the finance company office and released after promising to pay.

It is not submitted that this illustration is representative of the typical merchant, nor the typical finance company, nor even the typical consumer. Regulatory laws, however, are very rarely enacted to control the typical person or transaction. It is submitted, however, that the illustration is sufficiently representative to have induced legislation in many parts of the country, and it merits consideration in Mississippi.

This comment has several objectives. The nature of the institution of consumer credit will be examined in an effort to show why it is an area of concern. Many of the problems inherent in the current system will be discussed, and an effort will be made to understand why they have gone unsolved. Some of the attempted solutions will be evaluated and further suggestions will be made as to how the burdens of the consumer can better be alleviated.

The courts have traditionally treated consumer credit in two basic categories: lender credit and vendor credit. This analysis will temporarily treat them as separate entities also. In its simplest form the concept of lender credit may be illustrated by a consumer's borrowing from a financial institution in order to purchase a commodity from a retailer. Vendor credit, on the other hand, is exemplified by a consumer's direct purchase of goods or services from a retailer pursuant to a retail installment sales contract.

The separate discussion is in no way in allegiance to the general

rule that the two types of credit should be regarded as intrinsically different in the eyes of the law. The initial separate treatment is only to facilitate the tracing of the historical background of each.

I. Lender Credit

A. Historical Background Leading to Passage of Small Loan Acts

Even in ancient times usury legislation restricted the charges that could be made for the lending of money. Restrictions on interest rates became prevalent throughout the United States, but with interest ceilings ranging from six percent to ten percent, the making of small loans was impractical. It was too risky to lend to the consumer in small amounts without expending money for investigation, service, collection, and other handling costs. These expenses, added to the market rate of interest, drove the cost of a loan to a consumer far above the rates set out in the traditional usury laws. It became apparent to many that in order to prevent the whole field of small consumer loans from being left to unscrupulous "loan sharks" something had to be done to allow legitimate lenders to operate within the law.[1]

The rate limits found in the usury statutes had thus proven themselves unrealistic for the demands of the developing credit market in the United States. The Russel Sage Foundation sponsored the Uniform Small Loan Law which was drafted in 1916 and passed in most states in response to the inability of the hard-pressed wage earner to borrow from legitimate sources of capital.[2]

Because the general usury statutes prevented them from making small installment loans, lenders desirous of entering that market actively supported the passage of small loan legislation.[3] Despite the widespread clamor for small loan legislation, several arguments have been levied against such control. It is contended that the rate ceilings are generally set at a cost-plus basis, and thus even costly and inefficient lenders are allowed to participate in the market. It is also claimed that the rate ceilings will eventually become the actual price charged by lenders, or at least the floor.[4]

It is submitted that the regulation of rate ceilings is necessary for several reasons. First, consumer borrowers are frequently financially unable to shop around for competitors in the lending market. Second, consumers are, as a general rule, intellectually incapable of evaluating

[1] McEwen, *Economic Issues in State Regulation of Consumer Credit*, 8 B.C. Ind. & Com. L. Rev. 387, 403 (1967) [hereinafter cited as McEwen].

[2] Curran, *Legislative Controls as a Response to Consumer-Credit Problems*, 8 B.C. Ind. & Com. L. Rev. 409, 411 (1967) [hereinafter cited as Curran].

[3] *Id.* at 416.

[4] McEwen at 404.

the information furnished them concerning rates and terms of credit. Third, the supply side of the credit market is probably not sufficiently competitive to trust it to force its rates down to a reasonable level.

B. Mississippi Usury Legislation and the Small Loan Regulatory Act

Mississippi, as all other states except Maine, New Hampshire, and Massachusetts, has a broad general usury statute.[5] Mississippi Code Annotated section 36 (1956) establishes the contract rate of interest under the constitutional provision allowing the legislature to pass laws regulating the rate of interest.[6] When a borrower in Mississippi seeks to avoid a usurious contract, his remedies depend upon the extent to which the contract violates the usury law.

If the interest rate is above eight percent but below twenty percent, several alternatives are possible. The borrower may always recover the interest actually paid,[7] or if he has not paid the full amount, he may apply all interest to the remaining principal.[8] Although there is no obligation to pay the prohibited interest, the principal is an enforceable debt.[9] When the interest rate is in excess of twenty percent, the debtor may recover the entire sum of the principal and interest if it has been paid.[10] If there is still an outstanding balance on both principal and interest, the borrower may recover the amount paid, and the contract is void as to the balance due.[11]

The Mississippi Legislature, along with that of every other state, became aware that there was a conflict between the usury statutes and economic reality. It developed exceptions to the usury legislation in response to the expanding needs and pressures of the credit market. It enacted the Pawnbrokers Act[12] to cover small personal property loans, the corporate exception statute,[13] and the Small Loan Regulatory Act.[14] For purposes of analyzing Mississippi lender credit legislation, the Small Loan Regulatory Act will be used as the model since it is representative of exceptions to the usury statute and because it is the statute covering the majority of small consumer loans made in Mississippi.

---

[5] Letwin, *Canadian Consumer-Credit Legislation*, 8 B.C. IND. & COM. L. REV. 201, 203 (1967).

[6] MISS. CONST. art. 4, § 90(d).

[7] Warmack v. Boyd, 63 Miss. 488 (1866).

[8] Bell v. Tindall, 215 Miss. 343, 60 So. 2d 801 (1952).

[9] Patterson v. J. W. McClintock, Inc., 201 Miss. 107, 28 So. 2d 737 (1947).

[10] Miss. Code Ann. § 36 (1956). *See also* Bond v. Jones, 16 Miss. (8 S. & M.) 368 (1847).

[11] Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).

[12] Miss. Code Ann. § 5571 (1956).

[13] MISS. CODE ANN. § 36 (1956), *as amended*, (Supp. 1966).

[14] MISS. CODE ANN. §§ 5591-01 to 20 (Supp. 1966).

Mississippi's Small Loan Regulatory Act went into effect on July 1, 1958,[15] and was declared to be remedial by the state legislature at the time of its passage.[16] The action of the legislature in enacting the Bill ten years ago is commendable, but it is submitted that the Act is not sufficiently comprehensive to cover many of the problems of lender credit in Mississippi today.

In order to determine to which lenders the Small Loan Regulatory Act is applicable, it may facilitate matters to distinguish the lenders that the Act does not regulate. The lenders who are regulated by other statutes are banks, trust companies, building and loan associations, insurance companies, pawnbrokers, and credit unions. The Act is also inapplicable to loans in furtherance of agricultural operations, loans secured only by real estate, and loans made by occasional lenders.[17] The aforementioned exceptions are covered by other code sections or by the general usury statute.

It is submitted that the scattered statutes concerning lender credit, each regulating a particular type of lender or type of loan, are a result of piecemeal legislation. When the exchanges made in a particular unregulated market did not meet community standards of fairness and decency, it became necessary to impose the standards by community prescription through legislation. The enactment of consumer-loan statutes in Mississippi seems to have been a process of successively carving out exceptions to the existing interest and usury laws. As a result there is an accumulation of statutes in effect in the state—all relating to the consumer credit market, but each regulating a different class of credit arrangement. For example, the credit union rate of interest may not exceed one percent per month on the balance outstanding on a loan.[18] Persons making small personal property loans may charge interest up to ten percent per annum.[19] Banks and trust companies may make loans of up to 1,000 dollars to be repaid monthly. They may charge interest on such loans at a rate not in excess of the maximum contract rate of interest allowed by law, aggregate the principal and interest for the entire period of the loan, and divide it into monthly installments. If the loan does not exceed one hundred dollars, the bank may charge seventy-five cents per month in lieu of interest if the loan is payable monthly. If it is payable in a single payment, a charge of two dollars in lieu of interest may be made.[20]

---

[15] Miss. Code Ann. § 5591-20 (Supp. 1966).
[16] Miss. Code Ann. § 5591-01 (Supp. 1966).
[17] Miss. Code Ann. § 5591-18 (Supp. 1966).
[18] Miss. Code Ann. § 5410 (1956).
[19] Miss. Code Ann. § 5580 (1956).
[20] Miss. Code Ann. § 5212 (1956), *as amended,* (Supp. 1966).

For the purpose of facilitating analysis of the Act its regulatory scheme will be considered as composed of several classes: access to the market, disclosure provisions, the permissible terms and conditions, remedies, and enforcement.

The Small Loan Regulatory Act, as has been stated, will serve as the focal point for the examination of Mississippi lender-credit legislation. Even though other types of lenders and lending arrangements are significant, the loans made by small loan institutions are probably more prevalent among the lower income consumers. The boom year of 1955 will serve as an example to illustrate the above proposition. Statistics for that year indicate that upper-income groups tended to borrow directly from banks much more frequently than did the lower-income groups. Sales finance companies had great appeal to the low-income borrowers. These finance companies served as the source of credit for over fifty percent of installment buyers with annual incomes of less than 5,000 dollars.[21]

In order to make loans which are excepted from the general usury statute, one must become a licensee under the Small Loan Regulatory Act, if he does not already qualify under one of the other exceptions. If money is loaned without first obtaining the requisite license, furnishing a bond, and paying the privilege license tax, the offender may be fined up to 1,000 dollars or imprisoned in the county jail for six months, or both.[22]

Upon application for a license authorizing operation under the Act, one must furnish the comptroller of banks with certain information. There must be specified the address of the business, the address of each individual if it is to be a partnership, the address of each director and officer if the business is to be incorporated, and a statement of whether the applicant intends to participate in the market as a lender or a broker.[23] There are two types of licenses which are available: one type for those lending money directly and the other for those who will be engaging in the brokering of loans only.[24] It should be noted, however, that no business may operate under both types of licenses. No lender may have an interest in a loan brokering business.[25]

The case of *Richardson v. Cortner*[26] seems to uphold the above statutory prohibition of a two-headed operation. In that case the bor-

[21] Warren, *Regulation of Finance Charges in Retail Installment Sales*, 68 YALE L. J. 839, 840 (1959) [hereinafter cited as WARREN].

[22] MISS. CODE ANN. § 5591-33 (Supp. 1966).

[23] MISS. CODE ANN. § 5591-35 (Supp. 1966).

[24] MISS. CODE ANN. § 5591-44 (Supp. 1966).

[25] MISS. CODE ANN. § 5591-13 (Supp. 1966).

[26] 232 Miss. 885, 100 So. 2d 855 (1958).

rower went to the office of Southern Loan Services and was told that a loan of twenty-five dollars could possibly be "arranged" for her; the brokerage fee would be thirteen dollars. The small lending firm of Cortner and Ragland (composed of the brothers and sisters of the manager of Southern Loan Services) consented to lend the money to the borrower. When she defaulted after the first of her $3.20 weekly payments, Southern Loan paid off the note under the endorsement and the manager filed a writ of replevin to gain possession of certain household furniture described in a deed of trust executed by the borrower. Southern Loan prevailed at the trial, but the borrower appealed, contending that the arrangement between Southern Loan Services and Cortner and Ragland was a mere subterfuge to circumvent the usury laws, and that the "deed of trust" is void, since the "brokerage free" amounted to 232 percent interest. The court upheld the borrower's contentions since the proof showed that Cortner and Ragland had *always* lent money on the unconditional endorsement of Southern Loan and had never passed on loans to anyone else, and that Southern Loan was, in actuality, never a broker but a lender. The evidence also established the borrower's claim that Cortner and Ragland's checkbook was customarily kept in Southern Loan's office and that all payments to Southern Loan were deposited into the account of Cortner and Ragland. This result was reached primarily because one "lender" was also in fact the "broker."

One of the primary factors in analysis of small loan legislation is the method by which participants may enter the market, or, phrased in another fashion, what criteria are used by the administration in deciding whether a license shall be issued to a particular potential lender. When the licensing requirement is primarily a revenue-raising device, all an applicant generally has to do is fill out and file several forms and pay his fees. The issuance of a license itself under such circumstances could hardly be considered as the administrator's endorsement of the licensee's character and fitness, since there is no indication of a desire for investigation by the licensing agency as to the applicant's possession of such qualities. When licensing provisions require the licensing agency to determine that the applicant has met enumerated qualifications, and when these qualifications are something more than paying a license fee and filing the required forms, then participation in the regulated consumer credit activity is more likely to be restricted to those who are not marginal operators.

Within the provisions of the Small Loan Privilege Tax Act[27] the legislature has instructed the comptroller of banks to consider an appli-

[27] Miss. Code Ann. §§ 5591-31 to -54 (Supp. 1966).

cant's financial responsibility, previous experience, character, and his general fitness in deciding whether he, as administrator of the Act, should grant a license.[28] This provision, along with the requirement that the applicant post a 1,000 dollar surety bond[29] and pay a 200 dollar annual license fee,[30] would seem to indicate that the legislature intended to restrict the market of small loans to those whose qualifications are not inadequate or dubious. The other variable, however, is the degree to which the administrator of the Act actually considers the qualifications of the prospective lender to the extent to which he is authorized by the legislature. The number of marginal operators in the market depends on how fully he scrutinizes each applicant, but this is an area in which much further study must be done in order to draw any firm conclusions as to the practice being employed today.

The disclosure provisions of the Small Loan Regulatory Act set out in some detail the information that must be given to the consumer at the time the obligation is entered into and what subsequent disclosures must be made. The act[31] provides that the lender must present to the prospective borrower a copy of Mississippi Code Annotated section 5591-09, (Supp. 1966), the section which sets forth the ceilings on interest rates and the other permissible service and handling charges. The lender is also required to promptly issue a receipt to the borrower when each payment is made, clearly indicating the amount paid.[32]

It seems to be of some significance that although the lender is required to acknowledge in writing the specific amount paid in each periodic payment there is no mandate that the borrower be periodically so informed concerning the current balance outstanding after each payment is made. A great many consumers who are forced to rely upon small loan institutions for their purchasing power do not realize the significance of contracts and have difficulty in cross-checking the unpaid balance for errors the finance company might have innocently made. It may be argued, of course, that the borrower is already furnished with a true copy of the loan contract which contains a statement of the total amount due as required by statute, and that measure should be sufficient protection. It is submitted that in actual practice the contrary is true in many cases. This disclosure should be made periodically as is the acknowledgement of each payment received.

The recent case of *Consumers Credit Corporation of Mississippi v. Stanford*[33] issues a stern and probably a convincing warning to lenders

[28] MISS. CODE ANN. § 5591-39 (Supp. 1966).
[29] MISS. CODE ANN. § 5591-36 (Supp. 1966).
[30] MISS. CODE ANN. § 5591-37 (Supp. 1966).
[31] MISS. CODE ANN. § 5591-14 (Supp. 1966).
[32] *Id.*
[33] 194 So. 2d 868 (Miss. 1967).

operating under the Act. The case involved a suit by a lender licensed under the Act to recover the balance due on a note executed by a borrower. The borrower's defense was that the *broker* who arranged the loan failed to comply with certain disclosure provisions of the Act,[34] in that he did not furnish a statement showing the amount and date of the loan, nor did he issue receipts to the borrower for payments made on the loan. The broker and the lender both appealed from a directed verdict for the borrower-defendant. The arguments of the *lender* on appeal are significant. He claimed that since the statute only required "due care" on the part of the lender, that requirement was satisfied when the borrower signed an acknowledgement in the presence of the broker that he had received a full statement of his loan. The supreme court admitted the question was a novel one in Mississippi, but upheld the trial court on the ground that cases in many states had held that the parties to a small loan contract cannot nullify the public policy of the state by their agreement.

There was yet another significant point which was implicit in the *Stanford* decision. Apparently the court must have considered a broker as exclusively the agent of the lender, since it held the lender responsible for the violation of the broker. There is no indication in the opinion that the broker and lender were so closely connected as to be inseparable as to breach of duty by either, as was the case in *Ragland*. The vigorous dissent of Chief Justice Ethridge directly concerned this point. He was of the opinion that the general rule and cases upon which the decision was based were inapplicable since those jurisdictions bypass a broker and deal directly with the lender.[35] The apparent conclusion from the case is that any malfeasances by a broker will be imputed vicariously to the lender and that the contract will be held unenforceable even though the lender complied with the regulation according to the standard of due care.

If a lender in Mississippi gives the borrower a copy of the completed loan contract on which the date and amount of the loan, the payment schedule, the agreed rate of charge, and the address of the lender are stated, then all he need do is issue a receipt upon each installment payment to have substantially complied with the disclosure requirements of the Act.[36] It is hoped that this legislation is not a "permanent compromise," for it is submitted that further consumer protection is needed in this area. If the provisions in the contract form are for the purpose of allowing the consumer to make an intelligent decision as to whether he

[34] Miss. Code Ann. § 5591-14 (Supp. 1966).

[35] Consumers Credit Corp. v. Stanford, 194 So. 2d 868, 874 (Miss. 1967) (dissenting opinion).

[36] Miss. Code Ann. § 5591-14 (Supp. 1966).

will obligate himself as to its terms, then he should have an adequate opportunity not only to *read* the form, but to reflect upon the information provided in it. In many cases the consumer probably feels that the negotiation of terms is complete when the contract is presented to him for his signature. In such a case he therefore believes that the delivery of the contract is merely part of the execution of the formal legal documents which are the evidence of the negotiated agreement. For disclosure requirements to have any practical meaning at all, it seems important to require that the consumer be given a reasonable time to read the contract carefully, to receive assistance in interpreting its terms, and an unequivocal statement that the unexecuted contract is tendered to him not only for the purpose of signing it, but also for use in his decision whether to undertake the obligation at all. It is hoped, however, that such necessary disclosure would not merely become merged into the contract as "fine print," but would be verbalized and explained to each prospective borrower in terms which correspond to his sophistication in consumer credit matters.

As pointed out earlier, the terms and conditions of loan contracts before the small loan acts were passed were unsatisfactory to the consumer credit market—both the supply side and the demand side—and the Small Loan Regulatory Act was enacted to remedy some of the rules of law which made small consumer loans economically unfeasible. Rather than accept as an absolute the statement of the legislature that the Act is "remedial,"[37] the various terms and conditions of loan contracts authorized by it should be examined to see if the legislature's stated objective has been fulfilled.

If a consumer seeking purchasing power through the facilities of a small loan institution needs more than fifteen dollars, but less than one hundred dollars, he finds that his loan will be closely regulated by the Act.[38] There is a certain monetary amount above which the lender cannot legally charge, and there is also a limit as to the period of time the loan may run. For example, if the loan is of at least fifteen dollars, but not more than twenty dollars, the maximum monthly charge is $1.90 and the maximum time period is three months. The ratio of the amount of the loan to the maximum monthly charge and the allowable time period progress upward through a loan of ninety-nine dollars, for which the maximum monthly charge is $2.25 and the maximum time period is twelve months.[39]

The prohibition of a flat maximum charge breaks down, however, should the loan be for at least one hundred dollars. The service charge

[37] Miss. Code Ann. § 5591-01 (Supp. 1966).
[38] Miss. Code Ann. § 5591-09(a) (Supp. 1966).
[39] *Id.*

and interest combined on such a loan, however, may not exceed an amount equal to two percent of the amount of cash the borrower gets multiplied by the number of months the loan runs.[40] For example, if the borrower receives one hundred and fifty dollars cash pursuant to a loan contract calling for repayment in twelve months, the lender may charge as interest a sum of thirty-six dollars; if there is a loan of two hundred dollars running for a three-month period, the maximum amount of interest is only twelve dollars. There is an alternative method of computing the allowable amount of charge which authorizes the lender, if the loan is to be repaid in monthly or weekly installments, to charge six percent per annum for the entire period and aggregate the principal and interest for the entire period, dividing that amount into monthly or weekly installments.[41]

The lender, by virtue of subsections (b) and (c) of Mississippi Code Annotated section 5591-09 (Supp. 1964), has an option as to how he will compute the interest charges on a loan which is repayable periodically. If the lender takes the first option, which is to multiply two percent of the cash received by the number of months the loan is to run, he may charge interest of twenty-four dollars on a twelve-month loan of one hundred dollars. The rate of interest is then at twenty-four percent per annum. If the lender's choice is the second option, which is six percent of the amount of cash received added to the principal and divided by the number of monthly payments, a different amount of interest charge results. The borrower would pay roughly $8.33 per month or a total of $105.96. As a result of the difference in the amount of interest allowable, it is doubtful that lenders will frequently exercise their option to choose the second method of computation. The borrowers —at least those for whom this article is mostly concerned—cannot really be expected to be able to exercise any pressure upon a lender to compute according to the second method. Even in the doubtful case of a borrower who is sufficiently sophisticated in money matters, there is probably little chance of his having enough bargaining power to get better rates. Nor is it likely that a search for competitors who will give better rates will be fruitful. It is submitted that the second alternative is relatively meaningless in the lender credit market of Mississippi.

Another point of some significance is that if a loan is in excess of one hundred dollars, there is no limit as to the length of the period for which the loan may run. Probably of more importance is the fact that there is no monetary ceiling on the amount that may be loaned. By convincing a borrower that he needs a great deal more money than is

[40] Miss. Code Ann. § 5591-09(b) (Supp. 1966).
[41] Miss. Code Ann. § 5591-09(c) (Supp. 1966).

actually the case, the greater are the chances that the relatively ignorant borrower will overextend himself and be forced to default on his note. If the creditor has protected himself with adequate security, he will not be greatly hurt by the default. He will collect the money through garnishment or some other proceeding, but the debtor has found himself in financial straits because he borrowed more money than he ever needed. The problem of creditor's remedies is discussed in greater detail in a later section.

Under the Small Loan Regulatory Act a lender may make certain charges other than interest if the loan is of at least one hundred dollars. First of all he may add the actual recording cost of an instrument given as security for the loan.[42]

The lender may charge a reasonable amount for investigation of the title of any security by an attorney.[43] The Mississippi Bar Association recommends a fee of twenty-five to fifty dollars depending upon whether or not the attorney's investigation is only an opinion or is accompanied by an abstract.[44]

The lender may also add the cost of property insurance on the security, insurance on the borrower's life, and health and accident insurance taken out on the borrower.[45] Because the area of credit insurance is an area from which a great deal of abuse may result, it would seem to merit a more detailed discussion than the area of recording costs and security title examination.

Practically every creditor, whether secured or unsecured, may be said to have an insurable interest in the life and health of one who is indebted to him. The creditor will thus usually endeavor to protect that interest in one of several ways when he makes an installment sale or loan. The creditor may insure his debtor's life by taking out a policy himself, or he may acquire an interest in the policy as an assignee or pledgee thereof. Another option the creditor has is that of requiring the debtor to designate him as beneficiary.

When the creditor himself provides the insurance, the situation is rather clear-cut; if the policy is otherwise valid, then the creditor has an absolute right to the proceeds, notwithstanding that the debt has been discharged. The policy is therefore in such case not in legal effect a security device, since payment of the proceeds does not invalidate the policy or give the debtor any rights in the proceeds, nor does payment of the proceeds of the policy to the creditor-beneficiary discharge the debt.

---

[42] MISS. CODE ANN. § 5591-11 (Supp. 1966).
[43] *Id.*
[44] III HANDBOOK ON THE LEGAL RIGHTS OF THE MISSISSIPPI POOR 545.
[45] MISS. CODE ANN. § 5591-11 (Supp. 1966).

Credit insurance generally falls into two basic types: credit life insurance and credit accident and health insurance. Some of the outstanding features of each are as follows. First of all, the proceeds payable to the creditor will automatically liquidate the indebtedness, and if the proceeds more than discharge the debt, the excess is paid to the insured's estate or to a named secondary beneficiary. Credit insurance must be available at the time and place of the credit transaction. This is taken care of by the fact that the creditor or someone in his employ is nearly always an agent of the insurer. Credit accident and health insurance generally costs about twice as much as does credit life insurance, and consequently has not been nearly so widely used as the latter type.[46]

Granted that the institution of credit insurance of both types is a valuable one to both creditor and debtor alike when properly regulated, it is replete with potential abuse when left uncontrolled. Early regulation by the usury laws was inadequate since there soon became accepted the doctrine that since the sums paid for insurance were only additional consideration, the premium payments were not interest within the usury laws. The post-World War II credit insurance industry, however, brought the problem of regulation squarely into the limelight.[47]

The area of greatest activity with respect to consumer credit insurance became that of small loans because generally there were no traditional forms of security devices due to the lack of collateral held by the typical clientele. Initially, legislation prohibited the sale of credit insurance by the lender and was designed to prevent the loan shark from taking secret or extra profit through coerced collateral transactions. The states that prohibited the sale of credit insurance by lenders soon found that the legislation, in many cases, prevented the sale of consumer credit insurance altogether and lack of enforcement became the general rule. Generally, legislation throughout the country has been sporadic.[48]

It has been suggested that the creditor is often in a position to increase his income by virtue of the fact that he is often an agent of the insurer and receives a commission on each policy written by him. The problem has been succinctly stated as follows:

> [The average consumer's] ignorance of financial matters, his pressing need for funds, and his blind faith in the protection afforded him by state regulation renders him eager and willing to sign every document and perform every act which the creditor presents as an integral part of the transaction.[49]

---

[46] 55 *Symposium—Consumer Credit Symposium: Developments in the Law*, Nw. U. L. Rev. 301, 360-61 (1960).

[47] *Id.* at 364.

[48] *Id.*

[49] *Id.* at 361.

The debtor may well lose a great deal of the benefits of credit insurance if the creditor fails to disclose all the types of insurance available, and the "captive market" situation may well result in exorbitant rates. There is also inherent in the institution of consumer's credit insurance the tendency toward "reverse competition" which is described as follows:

> Some insurers have offered creditors successively higher rates that would result in the return of increased commissions or experience dividends to the agent, creditor or its affiliate. As a result, competition is guided not by the usual rule of the lowest possible rates to the insured borrower, whose inferior bargaining position is generally recognized to be wholly inadequate to remedy this procedure of "reverse competition."[50]

In the light of the problems that may arise in the area of consumer credit insurance, it seems appropriate to examine the Regulation of the Mississippi Small Loan Act in that regard. If a loan is of at least one hundred dollars, the lender may charge the borrower the actual cost of any premium paid for credit life, credit health and credit accident insurance.[51] It is commendable that the amount of the insurance may not be in excess of the amount of the loan and that the premium called for is in keeping with that usually and customarily paid for the same type of insurance.[52]

Mississippi has eliminated some of the opportunity for abuse by providing that the amount of the premium shall not exceed one dollar per one hundred dollars of the note. The state has also declared that the amount of insurance shall not exceed the amount of the loan. The amount of health and accident insurance which may be required by the lender is dependent upon the period of time for which the loan is to run. For example, the allowable premium on a twelve-month loan is $2.20 per one hundred dollars and an allowable charge for a loan which runs from thirteen to twenty-four months is $3.00 per one hundred dollars. In the event of repayment of the loan contract in full at least one month prior to the final due date, a refund of the insurance premium or cost must be made to the borrower in accordance with a direct ratio refund method.[53] This is valuable in the prevention of pyramiding.

Initial coercion is attacked under the section requiring the creditor to accept insurance from any insurer authorized to transact business in this state, if the debtor so requests.[54] Since there is no provision that the creditor inform him of this option, however, the choice is probably illusory, as the average debtor is ignorant of his rights.

---

[50] *Id.* at 362.

[51] MISS. CODE ANN. § 5591-11 (1966).

[52] *Id.*

[53] III HANDBOOK ON THE LEGAL RIGHTS OF THE MISSISSIPPI POOR 546.

[54] MISS. CODE ANN. § 5591-11 (Supp. 1966).

It is submitted that the Mississippi regulations of consumer credit insurance are relatively comprehensive, but that there is at least one feature which is significant in its absence. It is suggested that package plans and other devices for concealing what the debtor is or is not getting for his money should be dealt with under disclosure provisions requiring delivery of separate policies for each type of coverage at the time of the credit transaction.

The legislature has provided that no lender may make more than one loan to a borrower within a ninety-day period, unless the total sum of the service charge or interest is no greater for both than it might have been had loans been integrated into one single transaction.[55] The case of *Early v. Williams*[56] illustrates that as long as the lender follows strictly the letter of this provision, both loans are enforceable, notwithstanding the unconscionability of the transaction. The borrower-defendants in *Early* applied to Valley Loan Company, a brokerage partnership, for a loan of 715 dollars. On the following day these defendants signed a note to Consumers Credit Corporation, the named lender, for 1140 dollars payable in twenty-four equal monthly installments. They then executed to Valley Loan Company a chattel deed of trust for 1140 dollars on an automobile, since Valley Loan Company was then agent and the guarantor of their note to Consumers Credit. The following shows the composition of the loan: (1) $715 cash; (2) $122.14 interest; (3) $221.06 service charge; (4) $22.80 life insurance on the borrower; (5) $34.20 health insurance; (6) $22.80 insurance on the chattel securing the debt; (7) $2.00 recording fee.

Four months later, the defendants executed to Consumers Credit *another* note for 1440 dollars, also payable in twenty-four equal monthly installments. The instrument recited that the amount of the note was 1045 dollars paid to Consumers Credit (the defendants had paid 95 dollars on their first loan and then defaulted) plus a $393.50 service charge ($154.29 interest and a brokerage fee of $239.21) plus a recording fee of $1.50. When the defendants defaulted on these payments, the property securing the note was seized by replevin. The defendants appealed from a verdict directed against them.

The supreme court, in upholding the judgment, reasoned as follows. First of all, the lender may charge as service charges and interest, two percent of the amount of cash received by the borrower multiplied by the number of months the loan is to run. The borrower got 715 dollars cash, and when two percent of this is multiplied by twenty-four, the number of monthly payments, the result is $343.20, the maximum charge allowable. The court derived a figure of $346.20; presumably this was

[55] Miss. Code Ann. § 5591-12 (Supp. 1966).

[56] 239 Miss. 320, 123 So. 2d 446 (1960).

an arithmetic error. The respondent collected $343.20 of the amount and rebated $73.00, leaving an amount of $270.20. The court then stated that a lender may alternatively charge interest of six percent and aggregate the principal for the entire period of the loan. The sum of the items other than interest was $1017.86, and when multiplied by six percent the result was $122.14, which was the exact amount of interest charged. The court seemed to have held that both transactions were *technically* within the law, since more than ninety days had elapsed between the making of the "two" loans, and as a result, the computations and thus legality of the "first" loan applies to the "second."

The court's summation is quoted below because of the extreme relevancy.

> It seems incredible that any borrower, to get the sum of money which appellants received, would be willing to incur the stated expenses incident thereto. This is especially true as to the enormous brokerage fee. . . . Obviously, this was an improvident contract that the appellants should not have made. But Chapter 170, Laws of 1958 . . . expressly authorizes contracts such as are found in this case; and a party cannot be penalized as long as he complies with the law.[57]

Although the court's opinion in the *Early* case was based on the letter of the law, it is submitted that its spirit, or what *should* be its spirit, was given only lip-service. The problem of unconscionability seems to be the real issue involved in the case, and it will be discussed in detail later, with emphasis upon the *Early* decision and illustration of how some other jurisdictions have reacted to the problem of "reconciling the law with the equities."

In the category of terms and conditions of the transaction the problem of rebates upon prepayments of loans remains uncorrected. During the 1966 session of the Mississippi Legislature, House Bill 794 was introduced which would, in part, revise section 5591-14(3) of the Small Loan Regulatory Act. The proposed revision would permit prepayment of any loan at any time and in any amount. In event of such prepayment the borrower would receive a rebate on the interest and carrying charges. The bill failed,[58] however, and the following harsh result may still occur: One borrows money with interest and carrying charges spread out over a twelve-month period. If the loan is repaid in three months, the borrower will be paying for twelve months of service, but has had the benefit of the use of the money and the services for only three months. Reform would seem to be necessitated here if the

[57] 239 Miss. 320, 328-9, 123 So. 2d 446, 449 (1960).
[58] H.B. No. 794, 1966.

legislature is to truly make the Act "remedial," and a form of the "rule of 78ths" is recommended.

Assuming a twelve-month contract period, this essentially new "mathematical formula of the rule of 78ths" is used to compute the rebate: the number "78" is arrived at by adding the sum of the digits of the numbers one through twelve, since the pay period is twelve months (1+2+3+4+5+6+7+8+9+10+11+12 = 78). As an example, suppose that a borrower pays off a twelve-month loan in full on the date his fourth installment is due. The rationale behind the rule is presumably lost since the fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth installments have been paid in advance, the borrower should not be responsible for the carrying charges allocated to those months. To get the amount to be refunded to the borrower on his prepayment in the fourth month, start with the fifth month and count forward, getting the number of payments that would remain: (fourth, eight; fifth, seven; sixth, six; seventh, five; eighth, four; ninth, three; tenth, two; eleventh, one). The sum of the digits, 8, 7, 6, 5, 4, 3, 2, 1=36. Therefore 36/78ths is the amount of interest and service charges to be refunded.

There is one area, that of refinancing, in which Mississippi has recognized the need for judicial interference with individual small loan contracts. Despite the general acceptance of the view that when an installment loan is refinanced and the second contract is usurious, the validity of the first contract remains unaffected, it was held in *Associates Discount Corp. v. Ruddook* [59] that a usurious refinancing arrangement would render the original contract void.

Notwithstanding the comprehensiveness of a particular small loan act with regard to the correction of evils in the credit system, its ultimate success or failure will depend upon effective enforcement of its its mandates. The Mississippi Small Loan Act, under the administration of the comptroller of banks,[60] should be critically examined to ascertain whether or not enforcement can feasibly be effective within its present framework.

The comptroller of banks and his representatives have free access to the records of all licensees to ascertain whether they are complying with the act [61] and that the necessary expenses of any investigation concerning compliance shall be borne by the licensee under scrutiny.[62] The comptroller has the power to recommend that the state's attorney seek restraining injunctions.[63] This injunctive power, it seems, can be used

[59] 224 Miss. 533, 81 So. 2d 249 (1955).
[60] Miss. Code Ann. § 5591-04 (Supp. 1966).
[61] Miss. Code Ann. § 5591-07 (Supp. 1966).
[62] Miss. Code Ann. § 5591-08 (Supp. 1966).
[63] Miss. Code Ann. § 5591-16 (Supp. 1966).

to enjoin the particular illegal practice without curtailing the licensee's right to continue in busness. Inasmuch as this method of enforcement hits at the very core of the violation in question, and since it is corrective in nature, it is apparently one of the most effective methods of consumer protection.

When the comptroller believes that a lender is wilfully in violation of the Act, he holds a formal hearing with the alleged violators to determine the legality of its operation.[64] It is submitted that the machinery for enforcement of the Act is, for the most part, capable of dealing with alleged violators. A statewide organization can more easily evaluate the most effective means of halting widespread fraudulent practice, and its extensive activity will give it the power to do so. It is suggested, however, that local operations might escape surveillance if the local district attorneys are completely left out of the enforcement machinery, and a grant of concurrent jurisdiction to the comptroller of banks and the district attorneys is recommended.

It is also at least debatable whether the comptroller of banks should be the sole enforcement agency. Beginning in 1959 with the New York State Bureau of Consumer Frauds and Protection, an increasing number of jurisdictions have begun to allocate enforcement to special bureaus.[65] Through the New York Bureau alone, over a million dollars has been returned to consumers.[66]

The bureaus in those states that have them perform valuable functions at all levels of the consumer credit market. The California Consumer Counsel's primary purpose is in advising the governor and recommending consumer legislation.[67] The New York Bureau frequently confers with industry and aids its self-regulation attempts.[68] The Ohio Bureau has begun a bulletin service to better business bureaus and law enforcement agencies to keep them currently informed on consumer problems,[69] and the Michigan agency consults with private attorneys and local prosecutors concerning the various legal approaches that can be used in dealing with marginal lenders.[70]

It is submitted that the Mississippi Legislature could strike a blow at consumer ignorance as well as create more of a rapport between the supply and demand sides of the consumer credit market through its

---

[64] MISS. CODE ANN. § 5591-49 (Supp. 1966).

[65] *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 430 (1966).

[66] *Id.* at 431.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 432.

[70] *Id.*

authorization of such a specialized bureau as exists in seventeen other states.[71] The agency could operate in one or more of the capacities mentioned in the paragraph above. It might, in addition, assist in informing the public of the pitfalls that face them in the market place. Mass dissemination of leaflets, consumer conferences, speeches before interested groups and other mass media could all be integrated into a successful consumer education program.

II. Vendor Credit

Although the primary consideration in the remainder of this article is with "vendor" credit, rather than with direct loans, it is hoped that these two basic types of consumer credit will be seen as not so intrinsically different as to justify Mississippi's "remedial" legislation in the one while leaving the other almost entirely unregulated. As the history behind small loan legislation is significant in understanding the basic principles of such laws, so too is the historical background of retail installment sales important in comprehending the reasons for the relative dearth of legislation in the area.

One of the most significant developments in the economic habits of the modern American consumer is the pronounced trend toward individual ownership of personal assets that provide recreation, transportation, and household services. The expansion of consumer credit has undoubtedly played a most important role in making asset ownership feasible for persons in the middle- and lower-income levels.

With the advent of mass production techniques in the automobile industry, installment purchasing came into its own. From less than one billion dollars in 1918 the amount of consumer credit outstanding rose to in excess of three billion dollars in 1929 and reached six billion in 1941. The post-war boom resulted in a jump in consumer installment credit to 14.7 billion dollars in 1950. In 1958 the figure rose to 33.1 billion dollars.[72] It would seem that this spectacular rise in installment credit would have magnified the abuses prevalent in credit selling and that it would have intensified a drive for comprehensive statutory regulation of the retail installment sales business throughout the country. Such was not the case, however, as it was with comprehensive nationwide regulation of direct lending. It is important, therefore, to try and understand the reasons for the lack of response to abuses in retail installment credit sales.

The general nature of a retail installment transaction may provide some insight into the problem. Under a typical credit sale arrangement

[71] *Id.* at 430.

[72] Warren at 839.

credit is extended by the seller to the purchaser. The direct transaction enables the buyer to take immediate possession of the item purchased and to pay for it in periodic installments. The privilege of making the payments on time costs the purchaser an amount over and above the price of the goods. This excess may or may not be identified specifically to the purchaser as a credit charge. The seller quite often sells the credit contract immediately to a sales financing agency for an amount less than the aggregate amount of all installments to be paid under the contract. The example at the beginning of this comment of the potential abuses of a credit sale as outlined above would seem sufficient reason to inquire into the lack of legislation in the area. From the history of retail installment credit, one finds that the practice of selling on time for higher than the cash price grew up almost thirty years after over-the-counter lending emerged,[73] and from its inception it was never subject to usury laws as was the lender category of consumer credit. Because there was, therefore, no exclusion from the market of installment sellers, they were not forced by economic necessity to encourage reformative legislation as were installment lenders.[74] The significance of this fact is that whereas consumer loan legislation was initially a response to pressure for broader regulatory participation from the market itself, retail installment credit legislation and other curative measures must necessarily result from a general nationwide pressure for elimination of abuses occurring within a largely unregulated market.

A. The Time Price Rule

It appears that one of the primary obstacles to judicial correction of problems in retail installment sales is the concept that the usury laws are inapplicable to the amount charged for a commodity in an installment sale which is in excess of the amount for which that same commodity would have been sold to one who was financially able to tender the full "cash price." In the Mississippi case of *Mullins v. Merchandise Sales Co.*[75] it was held to be the rule in this state that credit sales are clearly exempt from the usury statutes. The complainants in that case, upon deciding to have their home repaired, were faced with an option of two different prices at which the service was available; one was a *cash* price of $2,268 and the other was a monthly installment price of $58.14 to be paid over a sixty-month period. The latter alternative would create a total debt of $3,488.40. The homeowners chose the "credit price," and signed a note for that amount to Merchandise Sales Company, the assignor of the contract to repair. The complainants later sought cancel-

[73] CURRAN at 417.
[74] *Id.*
[75] 192 So. 2d 700 (Miss. 1966).

lation of the deed of trust and an adjudication of no indebtedness to the assignee on the following ground: the difference in the *credit* price of $3,488.40 and the *cash* price of $2,268 was greater than twenty percent and for that reason is void for violation of the usury statutes (twenty percent of $2,268 is $453.60; the excess of credit price over cash price in this case was $1,220.40). The supreme court was indisposed to uphold this contention, however, and held that the principle was firmly settled in Mississippi that where property is sold on credit, the fact that the difference between the credit price and cash price exceeds the legal rate of interest will not render usurious a transaction which was made in good faith.[76] (It is hoped that the words in the last clause mean that the sale in *Mullins* would not be applicable if an installment sales contract were a mere subterfuge for a loan.)

Bryant v. Securities Investment Co.[77] is another important case directly on point which seems to perpetuate the "time price" doctrine even more strongly than does *Mullins*. The purchaser had bought an automobile with a value of three hundred dollars and executed an installment purchase money note which was later assigned to the plaintiff. The conditional sales contract showed a down payment of one hundred dollars and an unpaid balance of four hundred thirty-eight dollars to be paid in twelve consecutive monthly installments of thirty-four dollars and a final payment of thirty dollars. When the buyer defaulted on the fifth installment payment, a writ of replevin was issued for the car, and it was subsequently taken into possession by the sheriff. The case was tried and judgment rendered in favor of the investment company. The defendant appealed, assigning as error the lower court's failure to hold the contract void because of usurious interest rates recited in the contract.[78]

The appellant's argument was basically as follows: The total *cost* price was only $358.75 which was $179.25 less than the total time price. After deducting sixty-six dollars for insurance, there still remained $133.25 which constituted an interest rate far in excess of twenty percent per annum [79] (the interest rate was approximately thirty-seven percent). The court's decision was that a seller may charge a credit price far greater than the cash price and the difference is not interest. It further stated that *even if considered as interest,* the disparity between cash price and credit price in excess of twenty percent will not amount to usury if the contract is between *a purchaser and a seller,* rather than *a lender and a borrower.*[80]

---

[76] *Id.* at 704.
[77] 233 Miss. 740, 102 So. 2d 701 (1958).
[78] *Id.*
[79] *Id.* at 744, 102 So. 2d at 702.
[80] *Id.* at 745, 102 So. 2d at 702-3.

It seems significant that in most states, the excess of credit price over cash price *is not viewed as interest,* but rather as an increase in the price of goods for the risk of selling on credit.[81] The Mississippi rule, on the other hand, seems to be even more firm, and states that the usury laws are inapplicable, even if the credit price-cash price dichotomy is considered as interest.[82].

Even the majority rule with regard to the "time price" produces an anomaly from the point of view of credit regulation. If one borrows a sum of money from a small loan company to finance the purchase of a consumer item, the loan cost and other aspects of the transaction are rigidly controlled; but, if he buys the item with a credit balance due the seller, the finance charges are unregulated. This seems to be the rule, even though the vendor may promptly sell the note to a financing agency. It should be remembered, however, that the Mississippi Supreme Court has indicated that good faith was a necessity in the immunity from usury doctrine.[83] It is hoped that this bit of dictum will become a reality, when the conditions so warrant. Exceptions to the "time price" rule have been carved out in some jurisdictions, and they are explained in the following section.

B. Exceptions to the Time Price Rule

The time-price immunity generally granted to retail installment sellers may not be available to the assignee of the sales contract if the buyer and a finance agency have agreed prior to a purchase that the finance company will finance a transaction by purchasing the buyer's contract from the seller [84] or if there has been significant contact between a buyer and a financer before a sale is closed.[85] Usury was found in *McNish v. Grand Island Fin. Co.,*[86] in which the salesman of the seller was considered as the agent of the financer by virtue of his representation to the buyer that the finance company would handle the sale. It should be noted, however, that the highest court of at least one state has held that the usury laws are inapplicable, even though the retail dealership and the financing agency were operated by the same individual.[87]

Some courts have found that the usury statutes are applicable if there is a close relationship between the dealer and the financer and

---

[81] *See, e.g.,* 6 S. Williston, Contracts § 1685 (3d ed. rev. 1938); Annot., 48 A.L.R. 1442 (1927).

[82] Bryant v. Securities Inv. Co., 233 Miss. 740, 745, 102 So. 2d 701, 702-03 (1958).

[83] Mullins v. Merchandise Sales Co., 192 So. 2d 700 (Miss. 1966).

[84] Jackson v. Commercial Credit Corp., 90 Ga. App. 352, 83 S.E.2d 76 (1954).

[85] Frankfurt Fin. Corp. v. Cox, 142 S.W.2d 553 (Tex. Civ. App. 1940).

[86] 164 Neb. 543, 83 N.W. 2d 13 (1957).

[87] Luchesi v. Capitol Loan and Fin. Co., 113 A.2d 725 (R.I. 1955).

particularly so when the relationship is marked by the finance company's practice of rebating a portion of the finance charge to the dealer and furnishing him with forms and related services. It was so held in *Daniel v. First Nat'l Bank*,[88] where a bank furnished a dealer with forms and assisted it in calculating charges. A similar holding in *Jackson v. Commercial Credit Corp.*[89] was based upon the fact that the dealer and the financing company had a common agent. Of course, there are courts which follow Mississippi's firm line on the subject. In *General Motors Acceptance Co. v. Weinrich*[90] it was stated that

> [The] mere fact that prior to the transaction plaintiff furnished [the retailer] with blank forms of chattel mortgages and notes, together with the rates of discount it would pay, and also forms of statements relative to the sale and solvency of the purchaser and directions how to proceed, certainly does not conclusively show that the transaction was a scheme to enable plaintiff to effect an usurious loan.[91]

One decision which is particularly commendable in its scrutinization of credit contracts which are sold to finance companies is *Hare v. General Contract Purchase Corp.*[92] That case involved a situation where one purchased a truck and made a down payment thereon, after which the balance owed was 1150 dollars. He executed a note for $1,439.13 to cover the balance. Of the $289.13 difference, $148.24 was for insurance and the other $140.89 was a "service charge." (The cash price was 1,750 dollars, and other than the insurance of $148.24, the remaining charge was $140.89.) The $140.89 amount was at the rate of 11.5 percent per annum, and was thus in excess of the constitutional rate which was ten percent. The Arkansas Supreme Court held that the contract in the hands of the assignee-finance company was unenforceable for the following reason:

> It is obvious that if a prospective purchaser of a car, radio, refrigerator, etc., should borrow $1000 directly from a finance company, then buy the article with the money and execute a one year note to the finance company for $1200, such transaction would be usurious. But the finance companies are accomplishing the same result by having dealers in cars, radios, refrigerators, etc., handle the sale in the first instance, and under the guise of a credit price, add an excessive charge which inures to the finance company, because the dealer is reasonably confident in advance of the sale that he can transfer the papers to the finance

[88] 227 F.2d 353 (5th Cir. 1955).
[89] 90 Ga. App. 352, 83 S.E.2d 76 (1954).
[90] 218 Mo. App. 68, 262 S.W. 425 (1924).
[91] *Id.* at 72, 262 S.W.2d at 429.
[92] 220 Ark. 601, 249 S.W.2d 973 (1952).

company for his own cash price. Thus, the finance company is getting the benefit of the increase.[93]

Another case should be mentioned because it reached a similarly desirable result, but on a slightly different basis. In *Norman v. World Wide Distributors* [94] it was held that a finance company which discounted at 1079 dollars a note due in three days for 831 dollars with knowledge that the sale was on a referral basis and that the dealer had changed its name three times during the preceding year, "was bound to inquire further into the operation of the seller of these notes, and having made no inquiry, it is held as though it had knowledge of all that inquiry would have revealed."[95]

It is necessary, because of the diverse decisions on the matter, to make inquiry as to the rationale underlying the time price-cash price dichotomy. It appears that there are two basic reasons; one is a fairly modern one, and the other is anachronistic. The former, it has been suggested, is based upon the common business practice of "floor planning." The practice occurs principally in businesses in which manufacturers will not extend credit to retail dealers. These retailers must then obtain their cash from financing agencies who take a trust receipt as security on the item that the retailer obtains from his distributor. It seems that, at this wholesale level, only one finance company deals with a given retailer, since a finance company is engaging in trust-receipt financing at some risk when it deals with a retailer whose purchases are financed by another company. Of course, the financer, after financing the dealer's inventory at a comparatively low rate of interest, expects the dealer to sell it the majority of his lucrative installment contracts. In order to further protect itself, the financer will furnish the dealer with forms for contracts and rates, as well as note charts. Varying portions of retail installment sales finance charges are rebated to the dealer by the financer, usually through the device of a "dealer reserve" fund. The rationale is that the credit price-cash price dichotomy should be perpetuated because it is not economically feasible for the dealers and financers to operate under any other system than one involving "floor planning" or a type of "dealer participation."[96]

As indicated earlier, it has also been suggested that a historic basis explains why the distinction became so entrenched in the case law. Only a very small amount of installment purchases were being made during the period in which usury statutes were enacted, and the statutes were

[93] *Id.*, 249 S.W. 2d at 978.

[94] 202 Pa. Super. 53, 195 A.2d 115 (1963).

[95] *Id.*, 195 A.2d at 118.

[96] WARREN at 845.

therefore primarily concerned with the evils of the direct loan. This fact was compounded when the courts were first asked to consider the effect of these usury statutes upon installment contracts, because the installment device was still a relative infant, normally associated with "luxuries." The courts thus were able to find a rational basis for finding a distinction between it and a direct loan.[97]

Insofar as the first rationale is based upon an economic necessity, it should be accorded a measure of respect. It is submitted, however, that the soundness of the rule exempting credit sales from usury statutes may be better evaluated by comparing the economic incidents of credit sales to direct loans from the consumer's point of view, at least in the instances of joint participation between a dealer and finance company in effecting such a credit sale. Take the case of a buyer who desires to purchase a large, durable consumer item, such as an automobile. Assume further that the buyer does not have the necessary cash to make the purchase at once. If the auto costs 1600 dollars, and the buyer only has 600 dollars, he may elect to borrow the remaining 1000 dollars from a financer; if the finance charge is 400 dollars, excluding credit insurance, etc., the usury statute will in most cases be applicable. If, on the other hand, he buys the same car under a conditional sales contract, the time price will probably be around 2000 dollars and the seller will discount the balance on the contract to a sales finance company, leaving the financer a profit on its advance. Under the cash price-time price dichotomy, the usury law would fail to protect the buyer in the second transaction, even though the credit-sale financing is identical, in several significant respects, to the direct loan financing. In both cases the buyer had to make his purchase over a period of time in order to obtain the desired item: He did not have the required funds to make the purchase at once. In both cases the source of his money is a financing institution. In both cases the buyer pays a sum of money in excess of the article's cash price for the privilege of deferring payment.

In spite of the stark economic facts the Mississippi Supreme Court, since the case of *Commercial Credit Co. v. Shelton*,[98] has held to its strict view that the usury statute is inapplicable to credit installment sales, presumably even if a finance company solicited this character of business from merchants, and, in addition, furnished them with schedules and blank forms for the purpose of effectuating the sales. Even though the court held against the debtor in *Shelton*, it is interesting to note that it suffered his attorney a quotation from his brief in the opinion. The short passage is quoted because it was so succinctly put and so appropriate today:

---

[97] WARREN at 842.

[98] 139 Miss. 132, 104 So. 75 (1925).

> These concerns take advantage of the desire of poor people who really cannot afford automobiles to have one, and hold out to them the bait of a cash and credit price, and the suckers bite.[99]

The court added a statement of its own:

> We shall not take issue with counsel on this statement, and would add thereto that there seems to have been a large increase in the population of the country since the time when the sage proclaimed that "a sucker is born every minute." However, the court must enforce contracts made between parties, even though one of the parties has been unwise in entering therein.[100]

Today, the maxim that one borrows money from need but purchases on credit by choice is certainly an anachronism. It is submitted that by the standards of contemporary life, one may "need" a washing machine, stove, or automobile just as desperately as a loan of money; those items are no longer "luxuries" but are necessary in order to enable one to live in similar circumstances as even his lower-income contemporaries. If the usury laws were designed to protect the weak and needy from the over-reaching of economically superior suppliers of capital, then it should be recognized that the bargaining position of installment buyers may be as disadvantageous as that of borrowers of money.

C. Statutory Limitations of Finance Charges in Retail Installment Sales

The strictures of the time price immunity have been examined, and it has been seen that a few jurisdictions have seized upon the opportunity to carve out exceptions by judicial decision when the state legislature has been unresponsive to the needs of the demand side of the consumer credit market. It is well to consider the restrictions which have been imposed by the legislatures themselves. As of January of 1959, there were thirty-one states which had retail legislation and twenty-three of them imposed limitations on financial charges. Six of the twenty-three states which limited finance charges did so regarding all tangible personal property sold at retail, while the remaining seventeen restricted the rate regulation to the field of motor vehicle sales.[101]

Mississippi has followed the majority of states in its regulation of motor vehicle sales only.[102] The applicable code section regulates upon the basis of four categories of automobiles. The finance charge on the sale of cars manufactured in the year of sale or in the year prior to the

---

[99] *Id.* at 139, 104 So. at 76.

[100] *Id.*

[101] WARREN at 851.

[102] MISS. CODE ANN. § 8075-14 (Supp. 1966).

sale is limited to seven dollars per one hundred dollars per year.[103] The limitation upon the sale of cars manufactured not more than two years prior to the year of sale is set at ten dollars per one hundred dollars per year. The ratio provides that the older the automobile, the higher permissible finance charge. A car manufactured not more than four years preceding the sale may be financed by the dealer at no greater than thirteen dollars per one hundred dollars, and cars over four years old may be financed at a limit of fifteen dollars per one hundred dollars per year.[104]

There is no specification in the Mississippi Act as to the method by which the finance charges on a given sale must be calculated. If the dealer elects the "add on" method, his calculation will entail only the adding of the finance charge to the amount the buyer finances. As an example of this method, it is assumed that one is undertaking his obligation pursuant to a class II automobile (cars manufactured no more than two years before the particular transaction) upon which the finance charges are limited to ten dollars per one hundred dollars. This statutory maximum does not at all limit the dealer to a true interest rate of ten percent per year because the buyer does not have the use of the entire principal balance for the whole year. Because he discharges his obligations pursuant to monthly payments and has the use of only about fifty percent of the original principal balance throughout the year, the true interest rate on a ten dollar add on charge is about 18.3 percent.[105] On a five-year-old car the per hundred rate is at fifteen dollars per one hundred dollars, yet the simple annual interest rate is approximately 27.7 percent. It seems that the finance charge maxima prescribed by the Mississippi statute are liberally drawn in favor of the financer.

It is not unreasonable to inquire into the reason for the reluctance of the various legislatures to set rate maxima on sales of appliances, furniture, and other non-vehicular personal property commonly sold by retail installment contracts. Several factors have been suggested earlier. It has been suggested that there is no reason for the credit industry to pressure for legislation since they do not have any problems with the usury statutes under the present system, except in those jurisdictions which have carved out limited exceptions to the time price rule. Another factor is that the demand supply of the credit market is unable to muster effective lobbying power because they do not have the funds to do so. One plausible explanation for the lack of all-goods legislation is that there appears to be a difficulty in drawing statutes which will be justly applicable to all the various types of personal property.[106] The cost of

[103] *Id.*
[104] *Id.*
[105] WARREN at 853.
[106] *Id.* at 855.

acquiring, servicing, and collecting the installment credit accounts with low balances is not greatly different from processing others with much higher balances. This means that the finance charge on a twenty-five dollar account must be a great deal more than that upon a fifteen-hundred dollar account. In addition to this factor the comparatively small amount financed in appliance sales, for example, coupled with the relatively high rate of risk in collecting the debt, contributes to the practice of charging higher finance rates on this type of commodity than in automobile sales.[107]

The economic soundness of the factors leading to different rates for different consumer goods is admitted. It is suggested, however, that they are no valid justifications for the complete failure to legislate in any area other than that of motor vehicles. It would seem that there should be a legislative response to the needs of consumers in their acquisition of common household goods that one desires in order to make life a bit more pleasant for himself and for his family. The low-income purchaser of household durable goods generally has no savings to rely upon. He must have the items to make life comfortable, and any failure to provide him protection is, in effect, to make his lot in life even worse, *because* of his lack of cash. It is an unwarranted anomaly that the wealthy are often able to buy at lower prices than are the poor, because the former is often able to pay cash. When they are unable to make immediate payment, they are able to borrow from the banks, whose rates are lower than those of small loan institutions, upon which the indigent must rely.

D. Disclosure of Terms in Retail Installment Sales

The "truth in lending" bill, enacted into law by Congress in August of 1967, is intended to provide a measure of relief for consumer debtors. It would require creditors to furnish their clientele with a statement of the total finance charge in an exact dollars and cents amount and also of the *true* annual interest rate on the outstanding unpaid balance of the debt. The following is a formula proposed by the Bill for determining the amount of interest to be paid on the declining balance of payments due:

$$I = \frac{2\ Y\ C}{M\ (N+I)}$$

I = true interest rate
Y = number of payments per year
C = cost of the loan

[107] *Id.*

M = money received
N = number of installments[108]

It may be fairly assumed that the basic policy behind the Act is that of aiding the consumer in shopping for the purchasing power by furnishing him with enough information to compare finance charges. At the same time the lending institutions would, by virtue of the consumer's increased knowledge, be forced to compete among themselves for a fair share of the credit market.

It is submitted that the efficacy of the Bill is more theoretical than real. It is conceded that the Truth-in-Lending approach would be very effective in a highly competitive market where there is a relatively high level of consumer education. The poor and uneducated, however, are relatively unaffected by such legislation. In the very unlikely event that he even reads the contract, he will most likely lack the bargaining power necessary to get any better terms than a given businessman dictates to him.

That the disclosure provisions of the Truth-in-Lending Bill will not effectively alleviate the burdens of the unsophisticated consumer is not the only regard in which it is insufficient. There may be some benefit when the Bill is applied to direct loans, but, once again, credit intallment sales have been left out of the picture to some extent. The Act does not apply to the thirty-day revolving charge account, nor does it require disclosure in the common open-end or add-on arrangement.

Under the revolving charge account arrangement the buyer may make occasional purchases and charge them to his account. He is billed for accrued charges, generally on a monthly basis. He then has the option of either paying the total unpaid balance, in which case there is no finance charge, or of paying a smaller amount, in which case a finance charge is computed on the unpaid balance and added to the next month's bill. The add-on or open-end form of retail installment sales contract differs from the traditional installment contract in that it permits further purchases pursuant to the original account. When he exercises his contractual rights to further purchases, the amount of the new purchase and finance charge is added to the balance, resulting in a new schdule as to the number and size of payments.

It appears that the reason for the failure to include the two above types of contracts in the Bill was because of the mathematical impossibility of calculation under the formula prescribed therein.[109] It has been

[108] Willging, *Installment Credit: A Social Perspective*, 15 Cath. U. L. Rev. 45, 66 (1966).

[109] Buergner, *Disclosure of Finance Charges in Credit Transactions*, 21 Personal Finance L.Q. Rep. 45, 46-47 (1967).

suggested that time rate disclosures could properly be made in open-end or revolving credit accounts if expressed in terms of dollars per one hundred dollars of principal per year, rather than as an annual interest rate, primarily because it may be expressed mathematically, and, additionally because the average consumer thinks in terms of dollars rather than percentages.[110]

The problem of disclosure is probably being dealt with most effectively by the Uniform Consumer Credit Code, now in its second draft. First of all the Code recognizes that detailed disclosure in contracts will cost money to the creditors which ultimately will be passed on to consumers and thus does not require disclosure in loan contracts involving 50,000 dollars or more; if one has such economic resources as to be able to borrow such large sums of money, he does not need special protection as do low-income consumers. The Uniform Code's disclosure provisions are relatively simple and provide no more than does the Mississippi Small Loan Regulatory Act, except that it requires the creditor to precompute the contract payments.[111] This disclosure requirement is sorely needed in the Mississippi Small Loan Act, since it would require the creditor to tell the debtor in advance the total amount payable for the credit and the total amount due under the contract.

The Uniform Code, like the Truth-in-Lending Bill, does not require rate disclosure in revolving credit situations. It does require that the debtor be informed as to how the finance charges in such arrangements will be computed, both in advance and with every month's bill.[112] The Code fills a gap which is found in most disclosure statutes by recognizing and providing against false and misleading advertising. The rationale is that of preventing advertisements which are enticing to borrowers and buyers and which cannot be cured by subsequent disclosure.[113]

The disclosure provisions of the Mississippi Small Loan Regulatory Act have already been outlined earlier, and suggestions have been made regarding them. Again, with disclosure as well as rate limitations, the sale of motor vehicles is the only type of retail installment credit which is statutorily regulated in this state. Under Mississippi Code Annotated section 8075-14 (1956) the buyer must be given an itemized list of what he must pay, including: (1) the cash sale price; (2) the amount and type of down payment; (3) the difference between items (1) and (2); (4) the amount of any and all types of insurance; (5) all official fees; (6) the principal balance [the sum of items (3), (4) and (5)]; (7) the

---

[110] *Id.* at 47.

[111] Jordon & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B. C. IND. & COM. L. REV. 441, 453-54 (1967).

[112] *Id.* at 454.

[113] *Id.* at 455.

amount of the finance charge; (8) the time balance [sum of items (6) and (7)]; (9) the number of installments; (10) the amount of each installment; and (11) the due date or period of each installment.

In addition to the above, the printed portion of the contract must be in at least eight point type. There must be a warning to the buyer not to sign the contract until after reading it and that he is entitled to a copy of the contract.[114]

E. The Holder in Due Course Doctrine

It was discussed earlier that there is a traditional doctrine holding that the usury statutes apply to a direct loan of money but not to a retail installment sale. There is at least one problem, the solution to which is made more difficult because of the preservation of the distinction between sales and loans. This problem concerns the availability of consumer defenses against a financing agency. Generally, the purchaser of a negotiable instrument takes it free of any defenses which may have existed between the seller and the buyer if he takes it without notice of such defense.[115] In the installment credit situation, therefore, the finance company that purchases consumer negotiable paper without knowledge of any valid defenses can enforce the promise to pay. The Uniform Commercial Code states that the mere knowledge that the negotiable instrument is issued pursuant to a consumer sale is not notice of a consumer defense.[116]

It would appear that the financer in a retail installment sales transaction is purely a source of money. He makes it possible for sellers and buyers, who have insufficient cash, to transact business. His purpose, however, is only to make a profit; the only commodity he deals in is money. It is immaterial to him whether the washing machine runs, whether the television works, or whether the sofa has faded. He seeks, therefore, to avoid any liabilities which may arise from defective merchandise sold under the contract which is assigned to him by the dealer. He accomplishes his purpose by placing a "waiver of defense" clause in the buyer's contract, which states, in effect, that the buyer waives any defense that he might have which would relieve him from paying the seller. He is to pay the assignee of the obligation in accordance with the terms of the contract.

The "waiver of defense" clause has its defenders, and they argue several points in favor of the clause. It is contended by financers that they serve as a source of credit only, and that the mere supplier of credit

---

[114] Miss. Code Ann. § 8075-13 (Supp. 1966).
[115] Uniform Commercial Code § 3-302.
[116] Uniform Commercial Code § 3-304 (b).

should not be prevented from collecting his debts simply because a given commodity is defective and because his credit supply was used to purchase the item. They argue that there is no reason to involve the financer since the warranties of seller and manufacturer are generally sufficient to protect the buyer. It has been further suggested that the elimination of the waiver of defense clause would cut off the sources of credit which depend upon its existence, and, finally, that under the doctrine of freedom of contract, there is no power to preclude the parties from agreeing to a waiver of defense clause.[117]

It is agreed that the financer has a great interest in perpetrating the right to include waiver of defense clauses in contracts, so as to become holders in due course, and thus be immunized from the defenses that the borrower might have against the seller. It is submitted, however, that there are arguments against the "holder in due course" immunity which are at least as valid as the arguments supporting it. One of the primary reasons why the doctrine is objectionable is the existence of the fact that the buyer who so desperately needs protection does not generally read the contract. When a rare individual does read one, he cannot really be expected to understand the waiver of defense clause because it is composed in the highly technical language of the finance company's attorney. It would seem that the ordinary credit buyer cares only that he has bought something that he needs, and that he should not be required to pay for it if it is defective. The only real protection that a consumer has in sales transactions is his power to refuse to pay, but the waiver-of-defense clause destroys this protection.

The holder in due course status is a powerful one, and it is very valuable to the finance company. The desire to retain the power to include the clause should suggest that it is equally necessary for the consumer to have some protection against the practice. The state of Massachusetts has pioneered in the move to eliminate the divorce between the sellers of goods and the suppliers of credit. Several years ago the legislature passed a bill denying the holder in due course privilege to any financing agency which takes a promissory note originating from the purchase of a consumer good.[118]

It is not suggested that the Mississippi Legislature abolish the holder in due course doctrine if and when it legislates further into the area of retail installment sales, even though it is noted that it has taken this step in its regulation of automobile installment transactions. It has provided that "no provision in a retail installment contract relieving the holder from liability for any legal remedies which the buyer may have

---

[117] Felsenfeld, *Some Ruminations about Remedies in Consumer-Credit Transactions*, 8 B. C. IND. & COM. L. REV. 535, 551 (1967).

[118] MASS. GEN. LAWS ANN. Ch. 255 § 12(c) (Supp. 1966).

against the seller under the contract, or any separate instrument executed in connection therewith, shall be enforceable."[119] It is submitted only that the courts recognize that there are financial institutions which abuse their status as holder in due course. In the previous discussion of the time price rule it was not submitted that *every* financer be subject to the usury statutes, but, rather, only those who deal very closely with the retailer to the point of actually doing business together. In that instance the assignment of the contract is just a legally protected method of effectuating a loan which would be unenforceable under any usury statutes. The court, it is submitted, should scrutinize carefully the relationship between a dealer and financer to see whether the financer was using the dealer as a conduit through which he could make an otherwise illegal loan, or if it accepted the dealer's negotiable paper with knowledge that the dealer was an unscrupulous merchant who would not abide by his contractual obligations. The courts of Mississippi should "pierce the veil" of legality as was done in *Hare, McNish, Daniel, Jackson,* and the other cases discussed in the section criticizing the time price immunity, when the seller and financer were so closely related that the usury statute could no longer be held inapplicable. Were a bank or finance company to know that it could be liable to the ultimate consumer, it would be very concerned about the reliability and honesty of the businessman whose installment sales it was financing.

F. The Parol Evidence Rule in Retail Installment Credit Contract Suits

The purpose of this section is to discuss the effect of the parol evidence rule upon contract suits involving consumer credit transactions. There are two primary questions to which an answer will be attempted: (1) Will extrinsic evidence be allowed in a suit on a written contract where one party has made an improvident bargain? (2) Will the parol evidence rule permit the introduction of evidence tending to show a legally unenforceable or otherwise unconscionable contract?

In essence, the parol evidence rule is that the embodiment of the agreement into one single writing makes all other utterances of parties concerning that contract legally immaterial for the purpose of determining the terms of the contract. In other words, when parties to a contract deliberately reduce their agreement to writing, it is presumed that the entire contract was embodied in such writing, and parol evidence is inadmissible to contradict or otherwise alter the terms of the writing.

The discussion of the parol evidence rule as it relates to installment contracts is broken down into several categories. Mississippi cases are used when there are relevant decisions on the subject.

---

[119] Miss. Code Ann. § 8075-13(i) (Supp. 1966).

1. *Parol Evidence Excludes Proof of a Warranty*

With regard to oral proof of a warranty, the Mississippi case of *Porter Hardware Co. v. Peacock* [120] is applicable. The suit brought by the seller was upon a writing, containing a promise by the buyer to pay the seller a certain sum on or before a certain time. The pertinent part of the note read as follows:

> This note is excuted for the following described property: one 14 horsepower Waterloo engine . . . which I have this day received from the Porter Hardware Company with the express agreement and understanding that the title to said property is now and shall remain in the Porter Hardware Company until all the said notes are paid in full.[121]

The court held that the promissory note was a contract that could not be varied by parol evidence showing that the seller warranted that the engine would generate sufficient power to run a particular factory.[122]

2. *Evidence That a Seller Misrepresented a Clause to the Buyer is Inadmissible in Absence of Fraud*

Delta Loan and Finance Corp. v. Craven [123] involved a purchase of a house trailer from the Southern Trailer Exchange in Jackson, Mississippi. The balance due of $4,840.32 was payable in forty-eight monthly installments, and on the day the note was made, the contract was assigned to Delta Loan and Finance Company.

After about one and one-half years, the husband became disabled and was financially unable to make any payments for a little over a year. Upon service of a writ of replevin by the finance company to get possession of the trailer and at subsequent trial, the buyer's defense was that at the time of the purchase, he was told that the credit life insurance would take care of the payments in the event he became too disabled to work.

The contract itself did not provide for health and accident insurance, and paragraph eight of the contract read as follows:

> *This agreement constitutes the entire contract and no waivers or modifications shall be valid unless in writing and attached hereto* and the property is accepted without express or implied warranties unless written hereon at the time of execution.[124]

---

[120] 129 Miss. 129, 91 So. 856 (1922).
[121] *Id.* at 135-36, 91 So. at 856-57.
[122] *Id.* at 138, 91 So. at 857.
[123] 231 Miss. 203, 95 So. 2d 104 (1957).
[124] *Id.* at 205, 95 So. 2d at 104-05.

The court held inadmissible the evidence of the seller's promise. It stated as its reason the familiar words that where a written instrument is plain and unambiguous, ". . . parol evidence is inadmissible to vary, add to, or contradict the written instrument." [125]

3. *The Parol Evidence Rule and Defense of Fraud*

Nash Mississippi Valley Motor Co. v. Childress [126] involved an action by a buyer for damages arising out of his purchase of a second-hand automobile. Four hundred dollars was paid at the time of the sale and the balance of six hundred dollars was payable in twelve monthly installments. The buyer offered to prove that at the time the purchase was made, the seller represented that the car had been driven eight thousand miles by its previous owner, and that he had relied upon that representation. Because of the allegations of fraud, the buyer was allowed to introduce expert testimony that it had been driven far in excess of the eight thousand miles as represented by seller.

Ostiguy v. A. F. Franke Construction, Incorporated [127] is not a Mississippi decision, but in the absence of a local case on point, it may be well worth consideration. Involved there was an action by a lender to foreclose several mortgages securing a promissory note. The defendants, upon obtaining a loan of ten thousand dollars, agreed to pay the maximum twelve percent interest, and also paid the plaintiff's attorney a sum of two thousand dollars under a purported retainer agreement. It seems, however, that the plaintiff's attorney never performed any services for the defendants and instituted the foreclosure action against them while the "retainer agreement" was still in effect. The court held that the two thousand dollar payment was a mere facade for a usurious loan. According to the *Ostiguy* case, therefore, for purposes of showing usury in a written contract, parol evidence is admissible even though it may directly contradict the terms of the writing.

Several conclusions may fairly be drawn from the above authorities: (1) parol evidence regarding a *complete writing* is inadmissible, in the absence of allegations of fraud, if the purpose of the proferred evidence is to vary or contradict the terms of the writing; (2) the fact that one party to a contract makes an improvident bargain is no ground for admission of extrinsic evidence; (3) allegations of *fraudulent* misrepresentations or violations of statutory provisions will probably be sufficient to allow an exception to the parol evidence rule.

---

[125] *Id.* at 205, 95 So. 2d at 105.

[126] 156 Miss. 157, 125 So. 708 (1930).

[127] 55 Wash. 2d 350, 347 P.2d 1049 (1959).

Only several pitfalls that may confront the unsophisticated buyer have been discussed in the preceding section, but this is only because there is not sufficient space to outline them all here. Some of those practices which have not been discussed in detail were found in the short history of a credit transaction at the outset of this paper. One of those marginal practices is the utilization of the cognovit or "confession on judgment" devices. Financial institutions are probably eager to perpetuate its use because it saves attorneys' fees since there are no complaints to file, and no defenses to overcome. Moreover, there are no chances that a court may decide that the money is not due. Some of the other effective weapons which creditors enjoy are as follows: (1) selling goods, but retaining title; (2) the threat of repossession in case the debtor has reason to refuse to make payments on unsatisfactory purchases; (3) repossessing goods, selling them to itself at low prices, and then suing the original buyer for the unpaid purchase price plus repossession and legal expenses; (4) the threat of garnishing the debtor's wages, which, in many cases, would cause the debtor to lose his job, as the debtor well knows.

G. "Unconscionability" and Consumer Credit

Beginning around 1953 the states began adopting the Uniform Commercial Code, and the Mississippi version will be in effect when this comment is published. It is submitted that by virtue of its retention of section 2-302 of the Code, the Mississippi Legislature has supplied the state courts with an extremely effective tool with which to alleviate the burdens of a great many consumer debtors. Of primary applicability is section 2-302(1) which states as follows:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The key to the success of that section quoted above is the particular court's definition of the word "unconscionable" in a given situation. According to what is probably the best possible authority, the test in determining whether a given clause is "unconscionable" is whether or not, considering the general commercial background and the commercial needs of the particular trade or case, the clauses in question are so one-sided as to burden one party with oppression and unfair surprise.[128]

---

[128] UNIFORM COMMERCIAL CODE § 2-302 Comment 1.

In order to more fully appreciate the potential effect of the "unconscionability" clause upon consumer credit transactions, it may be well to consider the circumstances prevailing before the courts receive the "green light" under section 2-302. Courts were previously faced with a dilemma: there was a duty to stay within the law; there was a corresponding and often conflicting duty to reach a desired result. They reconciled those conflicting responsibilities by twisting the law slightly or by adversely construing the language of the contract in question. This technique resulted in the perversion of either the law or the facts to find for the party with the "equities." The "unconscionability" section must have been provided by the draftsmen of the Uniform Commercial Code as a safety-valve to enable courts to find "unconscionability" in order to find for the party with the "equity" on his side but whom "the law" could not protect.[129]

The question naturally arises as to whether there will be any change in Mississippi consumer credit law when section 2-302 is left at the disposal of the courts. In order to better evaluate the possibility of change, it is, of course, necessary to define as precisely as possible the traditional view of the Mississippi Supreme Court on this matter as compared to another jurisdiction before the advent of the Code.

For purposes of comparison the case of *Williams v. Walker-Thomas Furniture Co.*[130] will be compared with the Mississippi case of *Early v. Williams*[131] because of the substantial attention the former has attracted.[132] In that case the appellant, a Mrs. Williams, a woman on relief with seven children to support, had, during the period 1957-1962, purchased a number of household items from appellee furniture company on printed-form installment sales contracts (in the guise of leases). Each of the contracts provided that the amount of each installment payment thereunder would be "inclusive of and not in addition to the amount of each installment payment to be made . . . under such prior lease . . . and all payments . . . shall be credited pro rata on all outstanding leases. . . ."[133] The meaning of this complex language in everyday English, of course, was that there was a balance due on *all* items, *whenever purchased,* until the balance due on *all purchases* was liquidated. When Mrs. Williams' outstanding balance had been reduced to only 164 dollars, she bought a 515 dollar stereo phonograph set. At the time when the

---

[129] 10 PRAC. LAW. 5 (May 1964).

[130] 350 F.2d 445 (D.C. Cir. 1965).

[131] 239 Miss. 320, 123 So. 2d 446 (1960).

[132] *See, e.g.,* 15 CATHOLIC U. L. REV. 269 (1966); Note, 79 HARV. L. REV. 1299 (1966).

[133] Williams v. Walker Thomas Furniture Co., 350 F.2d 445, 447 (D.C. Cir. 1965).

furniture store sold her the set it was aware that her sole income was a government relief payment of 218 dollars per month. The price of the set became too great a burden for her 218 dollars to bear, so she defaulted. The store then replevied every possible item that it had sold her. The court held that the contract was "unconscionable" and thus unenforceable because "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms . . . the usual rule . . . should be abandoned. . . ."[134]

One of the primary tests as articulated by the court in determining whether or not there are unconscionable terms in a particular contract was as follows:

> Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?[135]

The *Early* decision, discussed earlier, even though not a sales case under the Uniform Commercial Code, would have been a prime opportunity for the court to give some real meaning to its sympathy for the debtor. In that case the amount that he agreed to pay for a loan of 750 dollars was so disproportionate to the amount received and was such an improvident contract that the supreme court was prompted to state that *"it seems incredible* that any borrower, to get the sum of money which appellants [debtors] received, would be willing to incur the stated expenses incident thereto."[136] [Emphasis added]

The court thus realized that the borrower could hardly have understood the terms of the contract. It was not prompted, however, to inquire into his opportunities for understanding it. It was indisposed to consider whether the terms of the loan were ever clear to him, or whether the lender made any effort to help him understand. The effect section 2-302 will have in Mississippi in the future is a matter of speculation, but an examination of some of the cases in which unconscionability was the determining factor may give some guidelines as to what its effect *should* be.

In *American Home Improvements, Inc. v. MacInver*[137] the plaintiff was in the business of selling and installing home improvements. It agreed to do certain work on the defendant's home for a cash price of

---

[134] *Id.* at 449-50.

[135] *Id.*

[136] Early v. Williams, 239 Miss. 320, 328, 123 So. 2d 446, 449 (1960).

[137] 105 N.H. 435, 201 A.2d 886 (1964).

1,759 dollars. Since the defendant was apparently unwilling or unable to pay cash, the plaintiff undertook to arrange long-term financing and furnished defendant with an application to a finance compay (which was in some way affiliated with the plaintiff). The application was accepted and the defendant was notified that he was required to pay $42.81 monthly installments over a period of sixty months, which added up to a total "credit price" of $2,568.60. Soon after the plaintiff began work, and before it had done more than a negligible part of the job, defendant ordered it to stop. The plaintiff complied and promptly brought suit for breach of contract. The court, in holding the contract unenforceable, articulated its reason as follows:

> Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying $1609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features. . . .[138]

In Re Dorset Steel Equipment Co.[139] is a case in which an unconscionable financing contract was held unenforceable under section 2-302. There a security agreement was entered into between plaintiff and defendant at the time when plaintiff (then a partnership) was in severe financial difficulty. Under this agreement defendant advanced financing to the plaintiff against accounts receivable, and the plaintiff was required to incorporate so that defendant could exact an interest rate of approximately eighteen percent per annum. The court held that since the agreement contained the above and other onerous and unconscionable provisions, it would not be recognized as a valid security interest in plaintiff's bankruptcy.

An extremely interesting case involving the unconscionability clause is *FrostiFresh Corp. v. Reynoso.*[140] The court was concerned with an action by a seller to recover an amount due it under an installment contract for the purchase of a combination refrigerator-freezer. The contract, entirely in English, was executed by Spanish-speaking buyers. The cash price was 900 dollars and there was an additional service charge of 245 dollars, making a total retail price of 1145 dollars for the appliance, which admittedly cost the seller only 348 dollars. Although the defense of fraud was not available to the buyers because it was not alleged, the court held that it had power under the Uniform Commercial Code, section 2-302, to refuse to enforce the price and credit provisions in order to prevent an unconscionable result where it found

---

[138] *Id.*, 201 A.2d at 888.

[139] Bankruptcy No. 26532, (E.D. Pa., Aug. 2, 1965).

[140] 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966).

that the contract was "too hard a bargain."[141] The buyers, who had not returned the appliance, were liable only for the 348 dollar cost of the appliance to the seller. The seller was not entitled to any allowance on account of commissions it may have paid to salesmen, for legal fees, service charges, or overhead.

The recent case of *In Re State of New York (I.T.M., Inc.)*[142] involved a situation which was well-deserving of the "unconscionability" label applied by the court. The seller of household appliances had advertised to consumers that they would have the privilege of enrolling in a "referral sales program." For the privilege of enrolling the consumers would sign four documents which would allow them to begin making hundreds of extra dollars per month: (1) the consumer would sign a commission agreement providing for payment to him of an agreed amount for each prospect referred by him who would enroll in the plan plus guarantees and a bonus; (2) the "enrollee" would sign a credit statement; (3) he was required to execute a retail installment contract for a household appliance (the seller represented to him that this document was merely a formality necessary for the delivery of a demonstration model to the enrollee); (4) he was required to sign an installment order containing a penalty clause for cancellation.

After the various documents were signed, the seller immediately and without informing the "enrollee," assigned the retail installment contracts to finance companies. The following reasons were given for the court's decision that the scheme was unconscionable: (1) The seller lured the victims to enroll in the referral plain. (2) The deals were not arms-length transactions, since the consumers were not shopping for appliances, but were trapped into the contracts. (3) The seller knew that the contracts would be assigned immediately and this fact was concealed from the enrollees.

From a reading of the cases discussed above, it is apparent that section 2-302 can be an effective means of "balancing the scales" when one party has signed an oppressive contract with no meaningful choice as to its terms and which leads to a result never contemplated by the party. The cases involving the clause range from situations where the only opression is that the price of a product is grossly disproportionate to its value to those in which an ignorant consumer is enticed into a bargain which he never desired and is manipulated throughout the transaction by false promises upon which he relies, having no bargaining power to do otherwise. With the advent of the Uniform Commercial Code in Mississippi, then, the Mississippi Supreme Court can no longer

---

[141] *Id.*, 274 N.Y.S.2d at 759.

[142] 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966).

truthfully say that, "[A] party cannot be penalized so long as he complies with the law,"[143] and that "the court must enforce contracts made between parties, even though one of the parties has been unwise in entering therein."[144] Requiring the mutual assent of both parties to a contract is not a novel concept, however. The only difference that § 2-302 brings about is that the courts now have specific legislation to facilitate the nullification of contracts of adhesion.

Conclusions

Despite all of the problems that they must face in the market place, the poor, as a group, will continue to resort to consumer credit as the source of its purchasing power, regardless of whether or not it ever acquires the concomitant bargaining power which it needs in order to satisfy material needs and wants. Unless the problems of the poor are confronted and solved, that consumer group will continue to overcommit themselves, will continue to be unaware of credit charges, and will be easily cheated. The material question is what steps are necessary to alleviate the burdens of the poor. As is the usual response to an economic or social problem, much legislation has already been passed: small loan acts, credit union laws, motor vehicle retail installment sales acts, and others. When legislation has been insufficient, then courts have carved out exceptions to traditional doctrines. Will these controls over the consumer credit market be sufficient to forestall the weakening of sales-resistance and the purchase of unneeded commodities when the seller offers terms of "a dollar down and a dollar a week?" It is submitted that experience will prove to the contrary.

Long-range consumer education programs could be implemented in order to improve the bargaining power of the poor, but "education will have an impact and will tend to improve conditions, but the causes of the problem follow in the wake of an educational program—teaching the people about problems does not change the existing conditions."[145] The greater majority of the business community practice fairness daily and can exert great control over their marginal contemporaries if an organized conscientious effort is made to do so. The credit problems of the poor cannot be solved through legislation, judicial wisdom, and education alone. It is also necessary that the business community realize that it is in their own interest to work for an equitable regulation of the credit market. At that time the process of amelioration will have its

[143] Early v. Williams, 239 Miss. 320, 329, 123 So. 2d 446, 449 (1960).

[144] Commercial Credit Co. v. Shelton, 139 Miss. 132, 139, 104 So. 75, 76 (1925).

[145] Willging, *Installment Credit: A Social Perspective*, 15 CATHOLIC U. L. REV. 45, 62-63 (1966).

greatest impetus. The evolutionary process will truly begin whereby consumer credit will fulfill its potential in facilitating the exchange of goods, money and services to the mutual benefit of both business and the consumer.

Martin A. Kilpatrick

STUDENT NOTES

Bail—An Examination of Release on Recognizance

I. Introduction

"Because of the bail system, the scales of justice have been weighted for almost two centuries not with fact, nor law, nor mercy. They have been weighted with money."[1] This sober pronouncement was made in condemnation of prevalent bail practice, a system whereby an accused person may obtain conditional release pending his trial. The subject of condemnation is not that release is made conditional, but that it is made conditional upon the accused person's financial ability to pay a cash bail or to post bond. If he cannot pay, he must remain in jail. When this happens, the above statement does not seem too harsh an indictment of a system that has required indigent defendants to remain in detention until a trial could be had for the sole reason that they could not afford the cost of bail.[2] Because the bail system has discriminated against the poor —whose poverty was often their only crime—the great majority of critical studies made of the bail system in recent years have admitted that the system has not worked very well.[3]

The injustice of the bail system is manifest; it secures the presence of the accused at trial through imposition of stringent economic sanctions[4] with little, and often no, consideration given to his ability to pay bail. That the purpose of bail is to insure the appearance of the accused at trial is not denied,[5] and this purpose, by itself, is a fair concept. But aside from the inherent weaknesses and injustices of the bail system already mentioned, it is also the subject of much abuse because it is used for purposes other than to insure the appearance of the accused at trial. Bail is often fixed at a high amount to make sure that the defendant will be incarcerated and will pose no "danger" to the community.[6] This strikes at the basis of the presumption of innocence, a concept thoroughly imbued in our system of justice.[7]

What happens when an accused person is wrongfully detained either as the result of the inherent discriminatory operation of the bail system or as the result of deliberate action to insure his detention? The pretrial period—*i.e.*, the period between the time of a defendant's arrest

---

[1] Remarks of President Johnson on signing the Bail Reform Act, June 22, 1966, in Bail and Summons: 1965, at xxi (1966).

[2] D. Freed and P. Wald, Bail in the United States: 1964, at 7 [hereinafter cited as Bail in the U.S.]

[3] *Id.* at 110: "The trouble with the present system is that by relying on money, it jails too many of the poor; it also protects too little against the dangerous."

[4] Note, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693, 703 (1958) [hereinafter cited as *New York Bail Study*].

[5] Stack v. Boyle, 342 U.S. 1, 5 (1951).

[6] Paulsen, *Pre-trial Release in the United States*, 66 Colum. L. Rev. 109, 114 (1966) [hereinafter cited as Paulsen, *Pre-trail Release*].

[7] 9 Wigmore, Evidence § 2511 (3d ed. 1940): "The 'presumption of innocence' is fixed in our law."

and the time of his trial—is a crucial period. It may be—and often is—a lengthy period.[8] During this time defense counsel must be obtained or assigned by the court; bargaining takes place between counsel as to dismissal or reduction of charges; indictments are presented; innumerable motions are made and argued; pleas are formulated and settled; witnesses are located, interviewed and prepared; evidence is gathered; and strategy is outlined.[9]

The single fact that a defendant was in jail or at liberty during this crucial pretrial period may have an effect on the ultimate disposition of his case. Strong argument is offered that a causal relationship exists between pretrial detention and unfavorable disposition.[10] Or, as one spokesman for bail reform has said: "[W]hether or not a man makes bail has a vital effect on whether, if innocent, he will be acquitted; and whether, if guilty, he will receive equal opportunity for probation."[11]

No reason exists to justify the dependency of a defendant's freedom upon whether he was at liberty or in jail prior to his trial. Such a dependency should not prevail, but it does.[12] It prevails because of the inadequacies of the bail system—a situation that demands correction. The answer obviously lies in alternatives to the bail system, and the object of this study is to show what those alternatives are and why they should be utilized extensively. A prerequisite of this study, however, is a complete understanding of the bail system as it presently functions. The logical place to begin is with a survey of its antecedent development.

II. Origin and Development of the Bail System

Some evidence exists that the system of bail dates as far back as the time of Plato.[13] But the rudimentary form of the present institution had its origin in England, probably as the result of (1) the reluctance of sheriffs to assume the onerous burden of personal responsibility for their charges, (2) the delay of trials because of the sporadic appearances of itinerant judges, and (3) the diseased, unhealthy environment of the jails.[14] The sheriffs initiated the system by the practice of freeing a

---

[8] R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 7, 8 (1965): The period before trial may be long. It is always a crucial time. It is a time of parallel and competing interests, a period when the defendant must prepare his defense, and arrange his affairs; when the prosecution must prepare the government's case; when, perhaps even more than usual, the police must maintain peace and order.

[9] Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 633 (1964). *See also* Powell v. Alabama, 287 U.S. 45, 57 (1932).

[10] Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 655 (1964).

[11] Address by Attorney General Kennedy, National Conference on Bail and Criminal Justice, May 27, 1964, in PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 4 (1965).

[12] Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631 (1964).

[13] Foote, *Foreword: Comment on the New York Bail Study*, 106 U. PA. L. REV 685 (1958).

[14] Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

prisoner on his personal assurance, or that of some acceptable third party, that he would appear at his trial.[15] The third party, the surety, was invariably known as the "pledge" in the twelfth and thirteenth centuries.[16] At any rate, the pledge was literally the bailee of the prisoner, and if the accused failed to make his scheduled appearance, the pledge had to surrender himself. Eventually, however, the pledge was allowed to forfeit a promised sum of money in lieu of surrendering himself into custody upon failure of the accused to appear.[17]

A prisoner's release was largely discretionary with the sheriff until the Statute of Westminster in 1275;[18] as of that date, bailable offenses—as well as those not bailable—were specified. In time the function of bail passed from the sheriffs to the justices of the peace, and the criteria upon which they conditioned release were formulated under the common law rules: "the nature of the charge, the character of the accused and the weight of the evidence."[19] As a climax to these modifications of the bail system, accused persons were granted protection against excessive bail by the Bill of Rights in 1688.[20]

Significantly, the surety relationship in England has remained personal to this day. Indemnification agreements are illegal, and the notion of corporations (professional bail bonding companies) serving as sureties is held to be against public policy.[21]

In this country, unlike England, the need for supplementation of the personal surety relationship was more compelling.[22] Obviously, the considerations that lent to the formulation of the bail system in England, a compact island, took on an altogether different aspect when related to America, an unexplored wilderness whose greenery beckoned to the potential runaway defendant.[23] This need for added assurance laid the groundwork for the emergence of the professional bail bondsman.[24]

The role played by the professional bondsman in the American system of pretrial release is well illustrated by the typical procedure followed in New York City. Practically all bail there is rendered in the form of a surety or indemnity bond drawn by a professional bondsman acting through the authority of a bonding company. Upon the event of an accused's non-appearance the bonding company forfeits the bail amount to the court. The bondsman must then indemnify the bonding company out of a reserve fund deposited with the bonding company by

---

[15] BAIL IN THE U.S. 1.

[16] de Haas, *Concepts of the Nature of Bail in English and American Criminal Law*, 6. U. TORONTO L.J. 385, 388 (1946).

[17] BAIL IN THE U.S. 1.

[18] 3. Edw. 1c. 15.

[19] BAIL IN THE U.S. 1.

[20] 1 Wm. & Mary 2, c. 2 sec. 1, 2 (10).

[21] de Haas, *Concepts of the Nature of Bail in English and American Criminal Law*, 6 U. TORONTO L.J. 385, 397 (1946).

[22] BAIL IN THE U.S. 3.

[23] Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 TEXAS L. REV. 319, 322 (1965) [hereinafter cited as Botein, *Manhattan Project*.]

[24] BAIL IN THE U.S. 3.

him for that purpose. The defendant or a third party is then liable to the bondsman for the amount of the bond.[25]

To obtain the bond the defendant pays the bondsman a fee, which is determined by the amount of the bond; it is not refundable in any case, and if the bondsman has not required the defendant or a third party to deposit collateral for security on the bond, the defendant has no real incentive to return to court. His only investment in such a case is the fee, which will not be refunded anyway. If no collateral has been required by the bondsman, the bail system is seen to depend either upon the defendant being a good risk or his fear that the bondsman will pursue him if he flees. But if the defendant is indeed a "good risk," why should bond be required of him at all?[26]

Moreover, with discretionary power in the bondsman as to which defendants are "good risks" and therefore fit subjects for release, the bondsman—a purely commercial and non-judicial figure—is the ultimate determiner of whether a particular defendant obtains release or remains in detention. The accused who cannot meet the bondsman's fee must always remain in jail merely because he is poor.[27] Thus, what had its origins in the judicial function of setting bail has assumed a strictly commercial aspect.[28] Yet, this is the form of conditional release that prevails in the majority of American cities.[29]

III. Theory of Release on Bail

The theory of release on bail in this country seems to proceed from a belief in the existence of an *absolute* right to bail. Recent significant legislation by Congress and equally momentous revisions of the Federal Rules of Criminal Procedure have wrought changes in the federal bail system that are tantamount to an absolute right to bail, but the bail practices in the several states comprise a completely different system, quite apart from the federal system. For this reason the two systems—federal and state—will be considered separately.

A. *In Federal Jurisdictions*

The United States Constitution does not guarantee a right to bail.[30] The eighth amendment[31] contains a protective provision against the requirement of excessive bail, but this is not, ipso facto, a guarantee of a right to bail,[32] nor is the eighth amendment provision applicable to the states.[33] To discover the theory of release on bail, then, one must turn

---

[25] *New York Bail Study* 703-04.

[26] Paulsen, *Pre-trial Release* 115.

[27] *Id.*

[28] BAIL IN THE U.S. 3.

[29] Paulsen, *Pre-trial Release* 115.

[30] *See* Carlson v. Landon, 342 U.S. 524, 544-46 (1952).

[31] U.S. CONST. amend. VIII: "Excessive bail shall not be required. . . ."

[32] Carlson v. Landon, 342 U.S. 524, 544-46 (1952). But the eighth amendment's provision against excessive bail "has generally been construed as guaranteeing the right to bail by logical implication." Address by Chief Justice Warren, National Conference on Bail and Criminal Justice, May 27, 1964, in PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 7 (1965).

[33] *See generally* Collins v. Johnston, 237 U.S. 502 (1915).

to the practices of the federal courts, whose bail practices have been reformed drastically in the past five years.

Apart from the recent changes mentioned earlier, the Judiciary Act of 1789[34] and Rule 46(a)(1) of the Federal Rules of Criminal Procedure[35] have always unequivocally guaranteed a right to bail in all non-capital cases. This is to allow the accused to prepare an adequate defense and to alleviate the possibility of punishment before conviction.[36] The United States Supreme Court has uttered the following caveat against any infringement of this right: "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[37]

This traditional right to bail in all non-capital cases was supplemented in 1963 by a new policy issued from the Office of the United States Attorney General. This new policy directed all of the "United States Attorneys across the United States to recommend the release of defendants on their own recognizance in every practicable case."[38]

This policy, however, found full fruition when it was enacted into law by Congress in 1966. Known as the Bail Reform Act of 1966,[39] the new legislation made the following provision:

> Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required.[40]

Notice that the usual presumption is reversed. Normally, if an accused is eligible for bail, a bail amount is set when he makes his first appearance, and the accused may then make bond, *unless* he can otherwise show that he is worthy of being released on his own recognizance. Even if such release is recommended, the judge may or may not approve

---

[34] 1 Stat. 73, 91 (1789). Congress provided therein that "[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . . . " In cases punishable by death, bail was to be discretionary with the court, depending upon "the nature and circumstances of the offense, and of the evidence, and the usages of law."

[35] (a) *Right to Bail.* (1) Before conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

[36] Stack v. Boyle, 342 U.S. 1, 4 (1951).

[37] *Id.*

[38] Address by Attorney General Kennedy, National Conference on Bail and Criminal Justice, May 29, 1964, in PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 297 (1965).

[39] Pub. L. No. 89-465, ch. 207, 80 Stat. 214 (1966).

[40] Bail Reform Act of 1966 § 3(a), 18 U.S.C. § 3146(a) (Supp. II, 1966).

the defendant's release on those terms. But under the provisions of the Bail Reform Act the accused is accorded a *right* to be released on his own recognizance unless the judicial officer otherwise determines that such release will not be an adequate assurance that the accused will appear at trial.[41]

Even if the judicial officer makes this preliminary determination, he still may release the accused on any one of several conditions set forth in the statute.[42] He may:

> (1) place the person in the custody of a designated person or organization agreeing to supervise him;
>
> (2) place restrictions on the travel, association, or place of abode of the person during the period of release;
>
> (3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
>
> (4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
>
> (5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.[43]

The judicial officer may impose any one or a combination of these conditions, and in determining which of the conditions will be sufficient to insure the presence of the accused the officer is to consider

> the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[44]

The recently revised Rule 46(c) of the Federal Rules of Criminal Procedure makes similar provisions for the terms of release on bail, which terms are commensurate with the purpose of bail—*i.e.*, to assure the presence of the accused at trial:

> Terms. If the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the

---

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* § 3146 (b).

> defendant to give bail, the character of the defendant, and the policy against unnecessary detention of defendants pending trial.[45]

From the text of these bail reform measures one readily can see that federal bail practice has been liberalized to a great extent. The effect of the measures, however, should bring about the advent of a system of release that will no longer discriminate against the poor and that will alleviate many of the hardships experienced by them for reasons heretofore stated. But while this may seem to answer the demand for bail reform in the federal courts, what about the current practices in the state courts? Do the indigents there enjoy the same rights as now are guaranteed all defendants in the federal courts?

B. *In State Jurisdictions*

The constitutions of at least forty states contain a guarantee that an accused shall have a *right* to bail in all cases except those involving capital crimes, or in some instances those involving the specific crimes of treason and murder.[46] Mississippi's constitution, for example, provides: "Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."[47]

Moreover, the policy in Mississippi has been to encourage the granting of bail in proper cases, presumably those not excluded by the constitution.[48] Where bail is granted, the bond must be reasonable.[49] The reasonableness of the bond is to be considered within the context of "[t]he condition of the relator to give bond, the nature and character of the offense charged, and the maximum punishment to be inflicted on a conviction. . . ."[50] Furthermore, in order that an accused not be denied bail, his bond should be set at an amount that he will be able to give, yet that "will be calculated to insure his presence at the trial."[51]

These criteria admirably express the theory of release on bail, but the two decisions last cited represent the only enunciation of such principles by the Mississippi courts. This leads to the inviting conclusion that appeals seeking a reduction in bail are rare:

> Even when appeals are taken, it is difficult for higher courts to determine whether high bail was set because of the danger of flight or the threat of recidivism. In any event, an appellate court generally interferes with a lower court's bail decision only when there has been a clear abuse of discretion.[52]

---

[45] FED. R. CRIM. P. 46(c). This rule, as presently amended, was adopted by the Supreme Court and sent to Congress for approval on February 28, 1966. It became effective July 1, 1966. *Introduction* to BAIL AND SUMMONS: 1965, at xvi (1966).

[46] Paulsen, *Pre-trial Release* 110.

[47] MISS. CONST. art. 3, § 29.

[48] Wooten v. Bethea, 209 Miss. 374, 379, 47 So. 2d 158, 160 (1950).

[49] *Ex parte* Oliver, 127 Miss. 208, 215, 89 So. 915, 916 (1921).

[50] *Id.*

[51] *Ex parte* Goldsby, 121 Miss. 479, 481, 83 So. 673, 674 (1920).

[52] Paulsen, *Pre-trial Release* 125.

The truth is that in a large number of criminal prosecutions, the bail amount is set arbitrarily in terms of the seriousness of the crime charged or at an amount suggested by the prosecutor. The courts do not possess the administrative tools with which to make a study of each defendant's character and his propensity to take flight. This results, in the long run, in the formulation by each judge of a set of "rules of thumb" by which the bail amounts are keyed to the particular classes of crimes.[53]

Some states have equaled the federal government in reforming attitudes toward bail practices. New York, which probably has been foremost among these forward-looking states, enacted the following provision:

> . . . In all cases in which bail power is present, the court and the judges thereof may, in their discretion, parole the defendant if reasonably satisfied that the defendant will appear when wanted, failing which appearance a warrant for the arrest of the defendant may be issued by the court or judge in which or before whom he shall have failed to appear.[54]

New York—specifically New York City—was also the first state to experiment with forms of pretrial release other than release on bail. This experiment was the Manhattan Bail Project, and the influence exerted by its eminent success has been so far-felt [55] that that operation and results of the project demand separate study here.

IV. The Manhattan Bail Project

The Manhattan Bail Project was an attempt to make a thorough examination of then current bail practices in New York City and to "explore the use of release on one's own recognizance or pre-trial parole as it is called in New York."[56] The basic premise of the controlled experiment was that "more persons [could] successfully be released on parole if verified information concerning their character and roots in the community [was] available to the court at the time of bail determination."[57]

Such information was obtained by staff members—law students—during daily interviews with newly-arrested prisoners. Following each interview the law student attempted to verify the information through a source given him by the defendant. If the information could be verified and if the defendant received a requisite minimum number of points in the categories of residence, family ties, prior criminal record, and employment, he was eligible for recommendation for parole.

For the purpose of determining the overall effect of the project those defendants who qualified for recommendation were separated into

---

[53] *Id.* at 113.

[54] N.Y.C. CRIM. COURTS ACT § 47 (1962). Parole as the term is used in this sense in New York refers to release on one's own recognizance prior to trial.

[55] Botein, *Manhattan Project* 328.

[56] Ares, Rankin, and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole,* 38 N.Y.U.L. REV. 67, 68 (1963) [hereinafter cited as Ares, *et. al., Interim Report*].

[57] *Id.*

two groups—experimental and control. The recommendations of defendants who fell within the control group—the choice was arbitrary—were systematically withheld from the court. If the recommendation was that of a defendant in the experimental group, copies of it were communicated to the judge, the prosecutor, and assigned counsel.[58] A comparison was made of the progress and final disposition of control group cases as opposed to experimental group cases. A study of the results of this comparison analysis indicated that the presence—or absence—of a recommendation for parole was a strong factor in determining whether parole was granted.[59] Parole was granted in sixty percent of the cases in which the recommendation actually was submitted (experimental group cases) whereas parole was granted in only fourteen percent of the cases eligible for recommendations but in which recommendations were withheld (control group cases).[60] "In other words, judges paroled four times as many accused persons with the aid of verified information."[61]

Moreover, a difference in final disposition—*i.e.*, conviction v. acquittal, prison v. suspended sentence—was evidenced in a comparison of cases of defendants who were at liberty prior to trial and those of defendants (in the control group) who remained in detention.[62] Figures showed that while fifty-nine percent of defendants in the experimental group were found not guilty, only twenty-three percent of the defendants in the control group were found not guilty. Only twenty-one percent of the convicted defendants in the experimental group were sentenced to prison, but *ninety-six percent* of the convicted defendants in the control group were sentenced to prison.[63]

But the most illuminating facts of all—and those most damning to the system of release on bail—are these: At the completion of the operative phase of the Manhattan Bail Project in 1964, exactly 3505 defendants had been released on parole, on their own recognizance, upon the recommendation of the project staff. And of all these defendants, 98.4 percent made their appearances in court as scheduled. Only fifty-six persons —1.6 percent—wilfully failed to return to court when required. In contrast, the rate of forfeitures on bail bonds during the same period was three percent.[64]

The Manhattan Bail Project thus showed that release could be conditional on criteria other than the accused person's financial ability to pay for his freedom. The project also showed that where persons are released on these criteria they are more prone to return than those persons who are released under the prevalent practice of release on bail. That is, release based on realistic standards of stability—residence, family ties, prior criminal record, employment, etc.—is more reliable than release

---

[58] *Id.* at 74.

[59] *Id.*

[60] Address by Herbert J. Sturz, National Conference on Bail and Criminal Justice, May 28, 1964, in PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 45 (1965).

[61] *Id.*

[62] Ares, *et. al., Interim Report* 87.

[63] *Id.*

[64] PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE xxii (1965).

that must rely on economic sanctions for its effective enforcement. To all of this is added a final justification of release on recognizance: notwithstanding its improvement over the bail system in its capacity to produce the accused at trial, it is calculated to reach a class of defendants never reached before—the poor, for whom bail fast was becoming "a vehicle not to permit release but to insure detention."[65]

More importantly, the experience of the Manhattan Bail Project lent impetus to other states in inaugurating their own bail reform projects. Some form of endeavor—project, conference, study, or plan—has been reported from dozens of cities in more than four-fifths of the states.[66]

Mississippi currently has made no such effort toward re-evaluating its bail practices, and the most cogent question for the meantime addresses itself to a thorough examination of the current bail practice in Mississippi. The criteria for release and the conditions to be given weight by judges in determining the bail amount have been considered preliminarily, but further attention needs to be focused on the operation and administration of the bail system in Mississippi. How does it function from day to day?

V. Current and Proposed Bail Practices in Mississippi

As mentioned earlier an accused person in Mississippi is guaranteed a right to bail in all non-capital cases.[67] The Mississippi Supreme Court has declared that the policy of this state favors the granting of bail in all proper cases [68] and that judges should take account of the defendant's ability to make bond, the nature and character of the offense charged, and the maximum penalty to be inflicted on a conviction.[69] Finally, the high court has required that the bond be reasonable [70] and that it be set at just that amount that will insure the presence of the accused at trial without exceeding, if possible, an amount he will be able to give.[71] These utterances are in keeping with the concept that "[b]ail setting is . . . a delicate adjudication whereby the court will require only so much financial security—and no more—as will insure the defendant's appearance for trial. . . ."[72] But *who* may set bail?

The statutes provide that any judge—whether of the supreme, circuit, chancery, or county court—and all justices of the peace are authorized to set bail.[73] In addition, sheriffs or "any officer having a person in custody by virtue of a warrant of a justice of the peace . . ." are permitted to set bail in misdemeanor cases.[74]

---

[65] Ares, *et. al., Interim Report* 88.

[66] PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE xxv (1965).

[67] MISS. CONST. art. 3, § 29.

[68] Wooten v. Bethea, 209 Miss. 374, 379, 47 So. 2d 158, 160 (1950).

[69] *Ex parte* Oliver, 127 Miss. 208, 215, 89 So. 915, 916 (1921).

[70] *Id.*

[71] *Ex parte* Goldsby, 121 Miss. 479, 481, 83 So. 673, 674 (1920).

[72] Foote, *Foreword: Comment on the New York Bail Study,* 106 U. PA. L. REV. 685, 686 (1958).

[73] MISS. CODE ANN. § 2568 (1956).

[74] MISS. CODE ANN. § 1834 (1956).

The form of the bond as prescribed by statute requires the principal and two sureties to sign the bond.[75] It constitutes, in effect, a contract between the principal and sureties on the one hand and the state on the other.[76] The effect of the bond is to bind the accused, the principal, to answer to the offense with which he is charged until he is discharged by the court.[77]

The sheriff or other officer having custody of the accused is required to approve the sureties on the bond and may examine them under oath for that purpose.[78] Admitted and authorized fidelity and surety insurance companies may act as surety on a bond, and in the event they do, the sheriff is not required to approve them.[79] In the discretion of any committing court a defendant may be allowed to deposit a cash bail in lieu of a surety bail bond, and the conditions upon which the alternative cash bail is allowed are required to be set forth in the order of the court.[80]

If the principal does not appear when required by the court, a judgment nisi is entered against him and both sureties.[81] All three parties must enter an appearance at the next term of court to show cause why the judgment should not be made absolute.[82] At this time the sureties may be relieved of liability by surrendering the principal [83] or may be excused from doing so by showing that his default resulted from an act of God, or an act of the obligee, or an act of law.[84]

The sureties at any time prior to forfeiture may surrender the principal and thereby terminate the contract with the state.[85] If surrender of the principal is made after forfeiture, the sureties may recover any part of the bond, minus costs, that the court in its discretion may determine to award them.[86] If the principal flees, the sureties may pursue him into any part of this state or to any other state, arrest him, and return him to the proper court, without the usual requirement of extradition proceedings.[87]

All of the above provisions reflect only the letter of the law, and as such, they can have only the meaning given them by practical application in the day-to-day administration of bail procedures. Yet, to know the effect of these daily procedures is impossible without an exhausting study of Mississippi's bail system in operation. The Manhattan Bail Project, for example, was preceded by such a study,[88] and part of its success certainly can be attributed to the informative study, against which its success could be measured.

---

[75] Miss. Code Ann. § 2495 (1956).
[76] Warren v. State, 179 So. 2d 181, 182 (Miss. 1965).
[77] Miss. Code Ann. § 2490 (1956).
[78] Miss. Code Ann. § 2486 (Supp. 1966).
[79] *Id.*
[80] *Id.*
[81] Miss. Code Ann. § 2491 (1956).
[82] *Id.*
[83] Miss. Code Ann. § 2493 (1956).
[84] *See* Corn v. State, 250 Miss. 725, 729, 168 So. 2d 304, 306 (1964).
[85] Miss. Code Ann. § 2493 (1956).
[86] *Id.*
[87] *See* Cartee v. State, 162 Miss. 263, 272, 139 So. 618, 620 (1932).
[88] *New York Bail Study* 693.

The first requisite, then, in any re-evaluation of Mississippi's bail practices is to determine what those practices are. Based on studies made of the bail system in general and of the bail system in several states, a presumption presently exists that the operation of the bail system in Mississippi is not providing pretrial release to the extent necessary to make the operation consistent with the principles of pretrial release as voiced by the constitution, statutes, and the supreme court of this state.

If injustices exist in the present operation of Mississippi's bail system—and the probability of injustice is strong—they must be corrected. Perhaps a statewide conference, bringing together judges, prosecutors, defense attorneys, public defenders, and law professors, could be called to determine what steps should be taken to facilitate correction. From such a conference an experimental bail project similar to the Manhattan Bail Project might emerge.

At any rate, the first step toward correction would be the passage of legislation permitting an alternative form of release—*i.e.*, release on recognizance.[89] Release on recognizance could be made discretionary with the court and the statute could set forth the conditions upon which release on recognizance would be granted. The statute might provide for other alternative conditions of release, similar to those allowed under the federal statute,[90] in cases in which the court felt that release on recognizance did not provide sufficient assurance that the accused would appear for trial. In any event the detailed provisions of the statute could be formulated to meet the needs of a revised system of release, once those needs were determined.

Apparently, some courts in Mississippi already are experimenting with ad hoc forms of release on recognizance even in the absence of statutory authority.[91] Some defendants are allowed to sign their own appearance bonds under certain conditions, namely, (1) if the defendant is a resident of the state of Mississippi, (2) if he has not committed a crime of violence or house burglary, and (3) if he has no prior criminal record (traffic tickets and misdemeanors excluded, except serious misdemeanors).[92] This practice apparently has been successful and is capable of expansion, but for full fruition of its promise legislation still is urged as the only ultimate form of correction. As one authority closely associated with the Manhattan Bail Project has proposed:

> If the number of persons released on parole who fail to appear compares favorably with the number who furnish and jump bail—and thus far they have in every jurisdiction—then it becomes apparent the program is a great boon to the conscience and economy of the community.[93]

---

[89] *See, e.g.*, N.Y.C. CRIM. COURTS ACT § 47 (1962).

[90] Bail Reform Act of 1966 § 3(a), 18 U.S.C. § 3146 (Supp. II, 1966).

[91] Letter from Donald W. Cumbest to S. M. Davis, September 26, 1967: "I might add that recently our Court [circuit court of Nineteenth Judicial District] has allowed individuals in felony cases to sign their own bonds under certain conditions."

[92] Interview with Donald W. Cumbest, District Attorney for the Nineteenth Judicial District, in Pascagoula, Mississippi, November 10, 1967.

[93] Botein, *Manhattan Project* 331.

A second step toward correcting current bail practices in Mississippi would be passage of legislation making wilful non-appearance a separate crime. At present bail-jumping is not a separate offense in Mississippi, but if a program of release on recognizance were authorized by statute, the additional threat of punishment in the event of non-appearance might lend further impetus to the released defendant to return to court. Again, this measure should be given careful consideration in evaluating the needs of a system adapted to local use.

In summary, the proposals are these: (1) An extensive study should be made of current Mississippi bail practices in an effort to determine whether a need for correction exists; (2) If such a need does exist, and the probability that it does is great, a statewide conference should be called to investigate means of correction and improvement of the current system; (3) legislation permitting release of defendants on their own recognizance, at the court's discretion, should be passed; and (4) legislation making wilful non-appearance a separate crime should be considered and, if found desirable, passed. As with any program, the first step is the most important. A present and continuing need for a thorough study of Mississippi bail practices exists, and its urgency is magnified because all other phases of the proposed program are dependent upon it. The University of Mississippi School of Law is currently engaged in such a study, and the results of the project hopefully will reflect the cogency of the other proposals.

VI. Conclusion

This inquiry has attempted to show the injustices of the bail system as a means of pretrial release. The chief injustice is that the bail system has operated to prevent the release of indigent defendants during the pretrial period solely because they could not afford the cost of bail.[94] The importance of freedom during this period also has been shown.[95] Studies have proved the existence of a causal relationship between pretrial detention and unfavorable disposition.[96]

The disadvantages of pretrial detention are patent. Where the accused held a job and was supporting his family, pretrial detention serves to halt his income-producing capacity which further adds to his financial inability to secure release on bail and to hire an attorney.[97] Moreover, because his productivity is stayed, he may be forced to forego posting bail and obtaining release so that he might hire an attorney.[98] The family relationship of the defendant—even though he ultimately may be dismissed or acquitted—could be damaged seriously or destroyed as an aftermath of pretrial detention.[99]

Because an indigent defendant often must remain in detention during the pretrial period, the preparation of his defense is obstructed to

---

[94] BAIL IN THE U.S. 7.

[95] *See, e.g.*, R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 7 (1965).

[96] Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641, 655 (1964).

[97] *New York Bail Study* 725.

[98] *Id.*

[99] BAIL IN THE U.S. 43.

the extent that the final disposition of his case may be attributed largely to the fact that he was not free to help in the many phases of defense preparation.[100] His ability to obtain witnesses in his behalf is severely diminished, placing the burden on his attorney, a total stranger to witnesses, friends, and relatives, to perform this function alone.[101]

Finally, the demoralizing effect of remaining in prison may take a heavy toll on the spirit and demeanor of the defendant so that he may lose his desire to defend himself or may even enter a plea of guilty in despair.[102] Who will be heard to deny that a defendant's appearance—which may reflect the bolstered morale of a free man or else reveal the despondency of a man still imprisoned—will be noticed by the tribunal that will ultimately determine his fate?

Why, then, should the bail system be continued in its present form? Why not explore other means of pretrial release that will produce the desired results of reaching a greater number of defendants—notwithstanding their poverty—and of producing them at trial at an equal or better rate than attained under the bail system? The success of projects adopting systems of release on recognizance has been shown.[103] Systems of bail everywhere now must meet the challenge posed to criminal law: to allow for the protection of the state while at the same time preventing a violation of the spirit of equal protection.[104]

Courts so far have been unprepared to say that the mere fact that bail has been set for an indigent defendant constitutes excessive bail.[105] In *White v. United States*[106] the court refused to hold that bail, otherwise non-excessive, was excessive when imposed against a person who could not meet that amount.[107]

However, the Supreme Court has held in *Griffin v. Illinois*[108] that indigent defendants who cannot obtain appeals on an equal basis with other defendants, solely because of their indigence, are denied equal protection of the law.[109] Based on this premise the court posed the following query in another case: "[c]an an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"[110]

In *Griffin*[111] the Court also said: "There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has."[112] From this statement a leading authority on criminal law has

---

[100] *Id.* at 45-46.

[101] *New York Bail Study* 725.

[102] *Id.*

[103] The Manhattan Bail Project. *See* Ares, *et. al., Interim Report* 67.

[104] Foote, *Foreword: Comment on the New York Bail Study,* 106 U. PA. L. REV. 685, 692 (1958).

[105] Paulsen, *Pre-trial Release* 119.

[106] 330 F.2d 811 (8th Cir. 1964).

[107] *Id.* at 814.

[108] 351 U.S. 12 (1956).

[109] *Id.*

[110] Bandy v. United States, 82 S. Ct. 11, 12 (Douglas, Circuit Justice, 1961).

[111] 351 U.S. 12 (1956).

[112] *Id.* at 19.

made the following analogy: "It may be true, as well, that there can be no equal justice when pre-trial detention depends on a man's fortune."[113]

The courts thus seem to be moving away from the position that "[a] person arrested upon a criminal charge, who cannot give bail, has no recourse but to move for trial."[114] But until the courts move completely away from that position, many more indigent defendants will be denied release unless their ability to give bail is given more weight.[115]

This and other factors can be given considerably more weight if the administrative tools are provided. Again, a system of release on recognizance seems to be the best alternative, and many jurisdictions are moving toward its acceptance:

> We are, I believe, at the present time in the sweep of an idea—that of ensuring as great a measure of justice as is possible for all, rich and poor alike—an idea which seems to be spreading through the country with unusual vigor and rapidity.[116]

The urgent question now is how far will the idea of release on recognizance spread, and more specifically, will it spread to Mississippi? Hopefully it will, for its purpose is not to demand that every arrested person be released, nor is its purpose to confine the power of the courts to keep dangerous persons accused of capital offenses in detention. Its purpose is to enlarge justice.[117]

Samuel M. Davis

Evidence—Admissibility of Expert Opinion Testimony in Motor Vehicle Accident Cases

The number of automobile traffic accidents is steadily rising each year. There is a proportionate increase in litigation resulting from such accidents. A growing problem in these cases is the determination of the admissibility of expert opinion testimony. Mississippi has been very reluctant to admit such evidence. This note will attempt to determine the advisability of this position and the practicability of the alternative.

There is a great diversity in the positions of the various jurisdictions concerning the admissibility of expert opinion testimony in automobile accident cases. Highway patrolmen and other police officers comprise the largest group offered as experts in such cases. Proffered witnesses have ranged from automobile repairmen to college professors. The opinions offered generally relate to the speed of one or more of the vehicles at the time and place of impact, the point of impact, the relative positions of the vehicles involved, or their direction of travel either prior to or after impact.

---

[113] Paulsen, *Pre-trial Release* 121.

[114] United States v. Rumrich, 180 F.2d 575, 576 (2d Cir. 1950).

[115] Ares, *et. al., Interim Report* 79.

[116] Botein, *Manhattan Project* 321.

[117] Remarks of President Johnson on signing the Bail Reform Act, June 22, 1966, in Bail and Summons: 1965, at xxii-xxiii (1966).

In cases where the proffered expert opinions have been ruled improper, the courts base their decision on one of the three following reasons: the witness is unqualified as an expert; the facts which comprise the foundation for his opinion are insufficient; or the jury is equally competent to reach a conclusion on the matter, thus any opinion would be an invasion of the province of the jury. Some courts discussing two of the above reasons fail to clearly indicate the actual basis of their opinions.[1]

When a court excludes opinion evidence for one of the first two reasons, it implies either that a properly qualified expert could testify or that the expert's opinion would have been admitted had it been based on sufficient facts. The decision to allow or exclude such evidence is determined by the peculiarities of each case. In California a mechanic with nine year's experience, including the repair or towing of an average of twenty cars a week, was not allowed to testify as to the involved vehicles' probable course after impact;[2] but in another case a police officer who had investigated accidents for many years was allowed to give his opinion as to the point of impact.[3] The Idaho Supreme Court refused to allow a deputy sheriff's opinion concerning the possible defectiveness of plaintiff's brakes based only on his observation of skid marks;[4] but in another case it ruled that a sheriff might testify concerning the probable point of impact based on his observation of the location of the automobiles and debris after the accident.[5]

The reasoning employed in jurisdictions generally refusing expert opinion testimony in such cases—and the only reason which challenges the right of a qualified expert to give such testimony when a proper foundation has been laid—is that expert opinion testimony is an invasion of the province of the jury. The reasoning and the primary concern of such courts have been stated as follows:

> . . . [w]here the subject matter is of such a nature that it would ordinarily lie within the knowledge or experience of people of common intelligence, the opinion of experts should not be permitted as a substitute for the combined opinion of the jury. Any other rule would soon lead to trial by experts instead of by witnesses, and jury trials as we have known them would soon be a thing of the past.[6]

The speed of vehicles involved in accidents is the major subject in this field on which expert opinion is offered. It is the nature of all expert testimony that its admissibility must be tested in light of several factors: the qualifications of the offered expert, the subject upon which his opinion is sought, and the facts upon which his opinion is based. This

---

[1] *See, e.g.*, Fisher v. Suko, 98 N.W.2d 895 (N.D. 1959).

[2] Fishman v. Silva, 116 Cal. App. 1, 2 P.2d 473 (1931).

[3] Zelayeta v. Pacific Greyhound Lines, Inc., 104 Cal. App. 2d 716, 232 P.2d 572 (1951).

[4] Van v. Union Pac. R.R., 83 Idaho 539, 366 P.2d 837 (1962).

[5] Grant v. Clarke, 78 Idaho 412, 305 P.2d 752 (1956).

[6] Carmody v. Aho, 251 Minn. 19, 24, 86 N.W.2d 692, 696 (1957).

is certainly true with respect to estimates of speed. Courts reject estimates of speed based only on observation of the wreckage.[7] The testimony of a highway patrolman, an experienced accident investigator, as to the speed of a vehicle which left the highway on a 20-degree curve and plunged down an embankment was thus ruled improper. He based his opinion on the curve in the road, marks on the shoulder, photographs showing the vehicle's wrecked condition, and the character and location of the debris and parts of the vehicle.[8] Courts give more weight to estimates of speed when the foundation for the expert's opinion includes the length of skid marks.[9] At least one jurisdiction, Alabama, distinguishes between skid marks made prior to and after impact. It allows estimates made on the former[10] but disallows those based on the latter.[11]

If the foundation is deemed sufficient, the only remaining question is the qualification of the expert. Courts have held qualified a highway patrolman with seven and one-half years' experience who was familiar with the accident scene,[12] a sheriff who had investigated over 4000 accidents,[13] and a police lieutenant with 18 years' experience who graduated from a university traffic institute and taught an accredited university course on accident investigation.[14]

The second most common topic upon which expert opinion is offered in automobile accident cases is the point of impact. Since determination of the precise place where the collision occurred (for example, whether it was in plaintiff's or defendant's lane) is often the critical issue in the case, such opinion testimony has been particularly susceptible to the objection that it invades the province of the jury. In *Carmody v. Aho*[15] the expert, an assistant professor of mechanical engineering, was erroneously permitted to state in which lane the accident occurred. The allowance of this testimony based on physical evidence as to the position of the automobiles, the damage to them as shown by photographs, the debris and gauge marks on the highway, and the location of the bodies of the passengers was held to be reversible error.

If expert opinion on the point of impact is allowed, the courts insist upon the same prerequisites as in cases involving estimates of speed: experience, generally coupled with special training, and a sufficient knowledge of the facts to make the opinion meaningful. In *Gerberg v. Crosby*[16] a police officer who had been on the traffic investigation squad for seven years (investigating about 2000 accidents a year), had attended a special school on accident analysis for two weeks, and had frequently determined the point of impact in connection with his work was allowed

---

[7] *See, e.g.*, Flores v. Barlow, 354 S.W.2d 173 (Tex. Civ. App. 1962).

[8] Bailey v. Rhodes, 202 Ore. 511, 276 P.2d 713 (1954).

[9] Foreman v. Heinz, 185 Kan. 715, 347 P.2d 451 (1959).

[10] Jackson v. Vaughn, 204 Ala. 543, 86 So. 469 (1920).

[11] Jowers v. Dauphin, 273 Ala. 567, 143 So. 2d 167 (1962).

[12] Ferguson v. Hurford, 132 Colo. 522, 290 P.2d 299 (1955).

[13] Foreman v. Heinz, 185 Kan. 715, 347 P.2d 451 (1959).

[14] *Id.*

[15] 251 Minn. 19, 86 N.W.2d 692 (1957).

[16] 52 Wash. 2d 792, 329 P.2d 184 (1958).

to give an opinion on the point of impact. It was held that the trial court did not abuse its discretion in allowing this opinion based on the physical facts observed after the accident. Other witnesses allowed to give opinions as to the point of impact have ranged from a sheriff with four years' experience[17] and a highway patrolman with two years' experience[18] to a safety engineer who conducted a laboratory to which attorneys sent accident cases for analysis.[19]

The relative positions of the vehicles at impact is another subject upon which expert opinion is frequently offered. In *Wells Truckways v. Cebrian*,[20] a highway patrolman who had investigated over one hundred accidents in fourteen years, based his opinion on his personal observation of the physical facts as they existed thirty minutes after the accident. He testified that defendant's truck was at a twenty degree angle at impact and that this would have projected the trailer twenty-three feet into plaintiff's lane at the time of impact. The director of a traffic institute was allowed to give his opinion as to the relative positions of the vehicles involved based on all the physical evidence and the vehicles' directions of travel prior to impact.[21]

Expert opinions have also been allowed on a variety of other aspects of motor vehicle accidents. A consulting engineer who spent sixty percent of his time working as an accident analyst testified that an accident resulted from a single angle collision,[22] a police officer who had investigated 150 accidents a year for fourteen years testified concerning the possibility of one of the involved vehicles having bounced from the place where a visible mark on the highway indicated it had been to the place where it came to rest,[23] and a brake engineer with many years' experience road testing brake systems under varying conditions gave his opinion that a truck overturned due to an attempt to negotiate a turn at high speed.[24]

The leading Mississippi case on the admission of expert opinion testimony in accident cases is *Hagan Fence Co. v. Edwards*.[25] Neither of the drivers could remember anything about how the accident occurred, and there were no eye witnesses. The plaintiff called a witness, a purported expert "accidentologist," to place fault. The witness, a Mr. Alvin Doyle, was a mechanical and automotive engineer who operated an automobile repair shop. He was trained and experienced in photography and in judging the rate of speed of cars involved in an accident, their point of impact, and their angle of collision. He had been an automotive engineering consultant for several years at a major state university and had testified as an expert in many other trials. He based his opinion on photographs which had been introduced in evidence showing the two vehicles immediately after the accident, the location at which

---

[17] Grant v. Clarke, 78 Idaho 412, 305 P.2d 752 (1956).
[18] Gray v. Woods, 84 Ariz. 87, 324 P.2d 220 (1958).
[19] Campbell v. Clark, 283 F.2d 766 (10th Cir. 1960).
[20] 122 Cal. App. 2d 666, 265 P.2d 557 (1954).
[21] Moss v. Associated Transp., Inc., 33 F.R.D. 335 (E.D. Tenn. 1963).
[22] Bolstad v. Egleson, 326 S.W.2d 506 (Tex. Civ. App. 1959).
[23] Brower v. Quick, 249 Iowa 569, 88 N.W.2d 120 (1958).
[24] McSparran v. Ford Motor Co., 238 F. Supp. 329 (E.D. Pa. 1965).
[25] 245 Miss. 487, 148 So. 2d 693 (1963).

the vehicles came to rest according to testimony of other witnesses, and his personal inspection of the scene of the accident the day before the trial. With the aid of Mr. Doyle's opinion that the driver of defendant's vehicle caused the accident, the jury returned a verdict for the plaintiff. The supreme court in reversing the decision held that Mr. Doyle's testimony was an invasion of the province of the jury. It reasoned that since he had no facts before him that were not also before the jury, the jury was equally competent to determine who had caused the accident.

This holding indicates that the Mississippi Supreme Court will be reluctant to allow expert opinion testimony in automobile accident cases. Other cases confirm such an attitude. In *Saucier v. Talkington*[26] the trial court's exclusion of a highway patrolman's testimony was upheld because of a failure to prove his expertness with the necessary clarity. This patrolman was shown to have fourteen and one-half years' experience and special training in the determination of the question involved. While an exclusion on a basis of lack of qualifications is not as comprehensive as one based on "invasion of the province of the jury," the exclusion of this apparently qualified patrolman's opinion shows a marked reluctance to admit such testimony. In *Standard Oil Co. v. Crane*[27] the trial court's refusal to allow a highway patrolman to give his opinion was upheld. The court declined to determine whether the witness qualified as an expert, saying only that the jury was not denied any helpful aid to its own powers of deduction, for "[o]rdinarily the interpretation of physical circumstances is a function of the jury."[28]

The effect of the *Hagan* decision, as is pointed out in the dissenting opinion, "is to reject in automobile accident cases the use of scientific data and expert opinion."[29] The court has thus established an unfortunate precedent, which in cases such as *Hagan*, would deny the jury that information most pertinent to its determination of liability. In *Hagan* the drivers had no recollection of how the accident occurred, and there were no eye witnesses. The jury was forced to make its decision on the basis of the incomplete and unsorted facts—the photographs of the vehicles after the accident and testimony indicating where they came to rest. These factors could lead one trained in the effects of the laws of motion upon automobiles to an intelligent conclusion concerning the relative speed and position of the vehicles at impact. They offered the jury, untrained in such matters, at best a guess. The court pointed out that the witness had no facts before him which the jury did not also have. From this premise the court jumped to the implied conclusion that he possessed nothing that the jury did not. It thus reasoned that this opinion as to fault was necessarily an invasion of the jury's function of determining the facts. It is suggested that since Mr. Doyle did possess something which the jury did not—training in and experience with the forces controlling automobiles—his testimony was not an invasion of the jury's province at all, but rather was an aid to the jury in fulfilling its function.

---

[26] 251 Miss. 519, 170 So. 2d 434 (1965).

[27] 199 Miss. 69, 23 So. 2d 297 (1945).

[28] *Id.* at 80, 23 So. 2d at 299.

[29] Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 504, 148 So. 2d 693, 699-700 (1963).

The proper standard for determining the admissibility of expert opinion testimony, it is submitted, was pointed out in the case of *Woyak v. Konieske*.[30] A mechanic was there allowed to give his opinion as to the part of plaintiff's automobile which collided with defendant's truck. The court, in upholding the right of the witness to give such testimony, pointed out:

> Where the opinion of a witness is elicited the proper test to determine his qualification is whether his knowledge of the matter in relation to which his opinion is sought is such that it will probably aid the trier of the question to determine the truth.[31]

Admittedly, there is no basis for allowing expert testimony if the jury is really as competent as the expert to determine the issue. A determination of the admissibility of expert testimony phrased in terms of its aid to the trier of fact in carrying out its function, rather than in terms of usurpation of that function, would spare evidence such as that offered in *Hagan*. This would result in a jury in no ways weaker, but in many ways better informed.

This was well stated by the Washington Supreme Court in a case[32] upholding the propriety of a police officer giving opinion testimony upon the point of impact. Quoting *Grismore v. Consolidated Products Co.*[33] with approval, it said:

> Jurors and witnesses have separate and distinct functions. It is the duty of the jury to decide issues of fact. A witness could not usurp that function or invade the province of the jury, by his opinion, if he wished. It may accept it wholly, or in part, or reject it in toto. If the opinion meets with its approval it should accept it. The purpose of court trials is to ascertain the truth and rightness of matters in issue, and the purpose of expert opinion testimony is to instruct and aid the jury in ascertaining that truth, whether it be the ultimate fact or some minor evidential fact.[34]

The South Dakota Supreme Court recognized the value of expert testimony even in cases where the jury could reach a similar conclusion on its own. In *Wentzel v. Huebner*[35] an automobile went into free flight after leaving the highway at a curve and struck a telephone pole. An expert was allowed to give an estimate of the car's minimum speed based on a computation made possible by his special knowledge and training. The objection was made that such an opinion would invade the province of the jury. The jury, it was argued, could estimate the

---

[30] 237 Minn. 213, 54 N.W.2d 649 (1952).

[31] *Id.* at 221, 54 N.W.2d at 654.

[32] Gerberg v. Crosby, 52 Wash. 2d 792, 329 P.2d 184 (1958).

[33] 232 Iowa 328, 5 N.W.2d 646 (1942).

[34] *Id.* at 345-46, 5 N.W.2d at 656.

[35] 78 S.D. 481, 104 N.W.2d 695 (1960).

car's minimum speed by relying on the testimony and exhibits before them. The court agreed that the facts would indicate excessive speed to the ordinary layman but pointed out that

> [b]ecause such a mind is capable of approximations has not been generally received as a reason for excluding expert opinions when more exact estimates may prove helpful to the trier of fact.[36]

If the above test for the admission of expert testimony is to be used —that is, such testimony should be admitted when it appeared probable that it would aid the jury in its determination of the facts—what criteria should be used to determine if that test has been met? Certainly the witness must offer particular qualifications to render the opinion that he does. He should possess knowledge of the particular situation sufficient to render an intelligent opinion.

A survey of the cases reveals that the trial court, which has been charged with the determination of admissibility, should consider the following to determine competency:

1. *Education and Technical Training.* This would include formal education such as represented by a college degree in physics or engineering or by graduation from a traffic institute, and informal education such as attendance at police academies or short courses in various aspects of accident investigation.

2. *Practical Experience.* This would include activities tending to directly familiarize the witness with analysis of traffic accidents and the causes thereof, such as work experience as a highway patrolman or an automotive engineer.

In testing the facts at the witness' disposal, it should be determined that they are sufficient to make his opinion trustworthy and of value to the jury. The following has been suggested as the minimum basis upon which opinion as to the path or speed of a vehicle prior to impact should be allowed:

1. The point of impact in the highway as determined from fender dirt, skid marks or other physical facts.
2. Photographs or detailed description of the damage done to both automobiles.
3. Testimony indicating the precise points where the respective vehicles came to rest.
4. Description of the road surface and its condition.[37]

For testimony on the point of impact rather than speed, at least the last three of the above would seem necessary for a proper foundation. Of course, in any given case additional factors might be essential for an intelligent expert opinion.[38]

In addition to determining that the witness is qualified and that his opinion is based on sufficient facts, the trial court must also determine

---

[36] *Id.*, 104 N.W.2d at 701-02.

[37] Reath, *Scientific Data and Expert Opinion—Its Use In Automobile Accident Cases,* 24 Ins. Council J. 99, 102 (1957).

[38] *Id.*

that an expert opinion would probably be helpful to the jury. A basic test which might be used here is: Are the facts such that they beg an inevitable conclusion, or are they subject to interpretation?

With the trial court employing criteria such as these, it would seem justified in allowing expert opinion testimony whenever the requirements are met.

It is suggested that the Mississippi Supreme Court should re-examine its position with respect to the allowance of expert opinion testimony in motor vehicle accident cases. The Mississippi court has long recognized the necessity and propriety of expert medical testimony,[39] and it appears that qualified experts, employing knowledge of the scientific principles which control moving vehicles, are just as necessary and proper in cases such as *Hagan*. Nor is the wisdom of utilizing such expert witnesses limited to accident cases. Our world is becoming increasingly complex, and inevitably more and more subjects will fall outside the pall of common knowledge. The importance of expert opinion testimony will expand in direct proportion to the expansion of man's knowledge. If the jury system is to survive, it must continue to reach the right decision more often than not. A more enlightened attitude toward the admissibility of expert opinion testimony appears, in this light, essential to the survival of juries as such.

Charles Robert Butterfield

Privileged Communications Between Clergy and Penitent—Need of Statute in Mississippi

I. No Privilege at Common Law

Although eternal salvation is an affair between God and man, many penitents have sought consolation and advice in the confidential chambers of their ministers. Untouched by man's need to cleanse his soul of guilt, the common law would not generally allow a clergyman to withhold a confidential communication from a court of law.[1]

Authorities are uncertain as to the existence of a privilege for confessions to priests during the period of the Restoration.[2] This uncertainty stems from the 1606 trial of Henry Garnet, Superior of the Jesuits in England, who was tried, convicted and executed for treason.[3] The defendant admitted that he would be bound by the seal of confession to never reveal any private communciation—even if it concerned plans of

[39] Metropolitan Life Ins. Co. v. Wright, 190 Miss. 53, 199 So. 289 (1940).

[1] *See,* Normanshaw v. Normanshaw, 69 L.T.R. (n.s.) 468 (Div. 1893) (clergyman did not have the right to withhold a communication from a court of law); Broad v. Pitt, 172 Eng. Rep. 528 (C.P. 1828) (dictum) (Best, C. M., "The privilege does not apply to clergymen. . . ."); Anonymous, [404], 90 Eng. Rep. 179 (K.B. 1693) (dictum) (in recognizing the attorney-client privilege, Hold, C. J., said, ". . . otherwise of a gentleman, parson & c.").

[2] 8 Wigmore, Evidence § 2394 (McNaughton rev. 1961).

[3] Garnet's Trial, 2 How. St. Tr. 218 (1606).

assassinating the King. The court did not labor the point, and the clergyman was not forced to disclose any confessional secrets. Whether the court's failure to require Garnet to disclose such information constituted a privilege is questionable, but it is generally conceded that the privilege did not exist as a common law rule after the Restoration,[4] yet judges showed a marked reluctance to force disclosure. In 1828, C. M. Best stated, "I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence."[5] B. Alderson, in an 1853 decision, christened the communication "privileged" but said, "I do not lay this down as an absolute rule, but I think such evidence ought not be given."[6] The court demanded only disclosure of the confessant's name in 1860.[7] The priest refused and was committed for contempt.

The clergy-penitent privilege has not been included in the common law of most American jurisdiction;[8] however, forty-five states have abrogated the common law by statute, granting a privilege to such communications.[9] The five states that presently have no priest-penitent statute are: Alabama, Connecticut, Mississippi, New Hampshire, and Texas. In none of these states is there a reported case dealing with the privilege.[10]

---

[4] 8 WIGMORE, EVIDENCE § 2394 (McNaughton rev. 1961).

[5] Broad v. Pitt, 172 Eng. Rep. 528 (C.P. 1828).

[6] Regina v. Griffin, 6 Cox Crim. Cas. 219 (Cent. Crim. Ct. 1853).

[7] Regina v. Hoy, 175 Eng. Rep. 933 (Q.B. 1860).

[8] *E.g.*, Johnson v. Commonwealth, 310 Ky. 557, 221 S.W.2d 87 (1949).

[9] ALASKA COMP. LAWS ANN. § 58-6-5 (1949); ARIZ. REV. STAT. ANN. § 13-1802 (Supp. 1967); ARK. STAT. ANN. § 28-606 (1947); CALIF. EVID. CODE. § 1034 (1967); COLO. REV. STAT. ANN. § 154-1-7 (1953); DEL. CODE ANN. tit. 10, § 4317 (1966); FLA. STAT. ANN. § 90.241 (1959); GA. CODE ANN. § 38-419:1 (1953); HAWAII REV. LAWS § 222-20 (1955); IDAHO CODE ANN. § 9-203 (Supp. 1967); ILL. ANN. STAT. ch. 51, § 48.1 (Smith-Hurd 1966); IND. ANN. STAT. § 2-1714 (1933); IOWA CODE ANN. § 622.10 (1946); KAN. GEN. STAT. ANN. § 60-429 (1964); KY. REV. STAT. § 421.210(4) (1962); LA. REV. STAT. ANN. § 15:477 (1967); ME. REV. STAT. ANN. ch. 16, § 57 (Supp. 1967); MD. ANN. CODE, art. 35, § 13 (1957); MASS. ANN. LAWS ch. 233, § 20A (Supp. 1966); MICH. STAT. ANN. § 27A 2156 (1962); MINN. STAT. ANN. § 595.02 (1945); MO. ANN. STAT. § 491.060. (1949); MONT. REV. CODES ANN. § 93-701-4(3) (1947); NEB. REV. STAT. § 25-1206 (1964); NEV. REV. STAT. § 48.070 (1957); N.J. STAT. ANN. § 2A:84A-23 (Supp. 1966); N.M. STAT. ANN. § 20-1-12(c) (1953); N.Y. CIV. PRAC. LAW § 4505 (1963); N.C. GEN. STAT. § 8-53.1 (Supp. 1965); N.D. CENT. CODE § 31-01-06 (1960); OHIO REV. CODE ANN. § 2317.02 (Page 1953); OKLA. STAT. ANN. tit. 12, § 12-385 (1960); ORE. REV. STAT. § 44.040 (1963); PA. STAT. ANN. tit. 28, § 331 (Supp. 1966); R.I. GEN. LAWS ANN § 9-17-23 (Supp. 1966); S.C. CODE ANN. § 26-409 (1962); S.D. CODE § 36.0101 (Supp. 1960); TENN. CODE ANN. § 24-109 (Supp. 1967); UTAH CODE ANN. § 78-24-8 (1953); VT. STAT. ANN. tit. 12, § 1607 (1958); VA. CODE ANN. § 8-289.2 (Supp. 1966); WASH. REV. CODE § 5:60.060 (Supp. 1965); W. VA. CODE ANN. § 50-6-10 (1966); WIS. STAT. ANN. § 325.20 (1958); WYO. STAT. ANN. § 1-139 (1957).

[10] *But see*, Biggers v. State, 358 S.W.2d 188 (Tex. Civ. App. 1962) for dicta concerning the lack of privilege in Texas.

II. Need and Effect of the Statute

The need for confidential disclosure cannot be overstated. "Whether it is the law or not, people have the right to go to an ordained clergyman and tell their troubles without fear. This is the refuge of people in trouble, acknowledged by all men of good will."[11]

An Iowa court, recognizing the need of the privilege, stated:

> We are told of one in an olden time who found no place of repentance though he sought carefully with tears. This statute is based in part upon the idea that the human being does sometimes have need of a place of penitence and confession and spiritual discipline. When any person enters that secret chamber, the statute closes the door upon him, and civil authority turns away its ear.[12]

The clergy's need for the privilege is most apparent in the Catholic Church; Code 889 of the Canon Law dictates: "The sacramental seal (of confession) is inviolable. Consequently the confessor must exercise all diligent care not to betray the penitent in any degree by word, sign, or in any other way or for any cause whatsoever."[13] A confessor who dares directly to violate the seal incurs excommunication.[14] Only by Papal orders can such a one be readmitted to the Church.[15] If called to testify in a state not recognizing the privilege, a priest shall be compelled to either disclose what he has received in confession—in violation of his conscience, his clerical engagements, the canons of his church, and with a certainty of being stripped of his sacred functions—or committed for contempt of court!

The Catholic Church is not alone in prescribing a formal confession.[16] The ministers of most Protestant churches are obligated to keep confidential the communications revealed to them in their ministerial capacity. Although many denominations have not spelled out the precise discipline, their uncodified discipline or practice is as binding on them as though it were written.[17] Indicative of the Protestant position is a statement in the convention report of the 22nd Biennial Convention of the United Lutheran Church in America:

> In keeping with the historic discipline and practice of the Lutheran Church and to be true to a sacred trust inherent in the nature of the pastoral office, no minister of The Lutheran Church in America shall divulge any confidential disclosures given to

---

[11] THE LIVING CHURCH, July 23, 1961, p. 6 as cited in Reece, *Confidential Communication to the Clergy*, 24 OHIO ST. L.J. 55, 81 (1963) (statement of clergyman who had refused to testify and was awaiting judge's decision on contempt and imprisonment).

[12] Reulkemeier v. Nolte, 179 Iowa 342, 161, N.W. 290, 293, (1917).

[13] 4 NEW CATHOLIC ENCYCLOPEDIA 133 (1967).

[14] *Id.* at 134.

[15] *Id.*

[16] Excerpts from the Confession of Faith of the Presbyterian Church, as quoted in Reulkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290, 292 (1917).

[17] Reece, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 69 (1963).

> him in the course of his care of souls or otherwise in his professional capacity, except with the express permission of the person who has confided to him or in order to prevent a crime.[18]

The following letter of the New York Board of Rabbis to the court indicates the effect on the Jewish religion of granting or denying the privilege to clergymen.

> The New York Board of Rabbis deem it essential for the proper work of the Rabbi in the community, that any confidence reposed in him by husband or wife, individually or jointly, or anyone else who has come to him for counseling not be divulged and we hope that the court will sustain this action (i.e. Rabbi's refusal to testify). Otherwise the confidential work of the Rabbi in counseling would be completely vitiated, to the detriment of those who seek guidance.[19]

Dean Seward Reese of Willamette University of Law itemizes the effect of the privilege statute:

1. The individual clergyman is benefited because he knows that he can proceed with the complete assurance that confidences are protected by public policy.

2. The confessant is benefited by having a feeling of security in confiding in a priest without inhibitions when he is in need of spiritual aid and comfort. This security does not only apply to particular confessions that have been, or may be, revealed, but also to the member's general attitude toward the Church as a protected institution.

3. The Church, as an institution, is benefited. Public sanction through legislative enactments to protect the doctrines and practices of an institution is indicative of the prestige it enjoys in our society.

4. Trial courts benefit from the privilege. In a jurisdiction where there is no privilege statute, a trial judge is placed in a very uncomfortable situation when a clergyman is called to testify about matters revealed in a confession or other communication which he is under obligation to keep secret. The trial judge has no common-law authority by which he can declare the communication privileged. Yet, to attempt to make the clergyman testify will only end in refusal and possible imprisonment for contempt. He also would be aware of the fact that public opinion in all probability would be with the clergyman.[20]

III. The Statutes

Most of the clergy-penitent privilege statutes have substantially the same wording:

---

[18] Minutes of the United Lutheran Church in America, The 22nd Biennial Convention, 1960, at 277 as cited in Reece, *Confidential Communications to the Clergy*, 24 Ohio St. L.J. 55, 69 (1963).

[19] Kruglikov v. Kruglikov, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961), *appeal dismissed*, 16 App. Div. 735, 226 N.Y.S.2d 931 (1962).

[20] Reece, *Confidential Communications to the Clergy*, 24 Ohio St. L.J. 55, 60 (1963).

> A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, without consent thereto by the party confessing.[21]

The statutes have been strictly construed by the courts and the communication must meet exactly the terms of the statute before the privilege will be allowed.[22] In describing who may hear the privileged communications, some statutes use the words "priest or clergyman."[23] Others use the words "minister of the gospel or priest,"[24] or use only the word "clergyman."[25] Nine of the state statutes specifically mention "rabbis"[26] although they might be included by the term "priest." None of the statutes require that the clergyman be empowered to pronounce absolution as a qualifying requirement for him to come within the statute. No statute restricts the designation of the one who hears the confession to "priest." All add at least one more designation—always in Protestant or Jewish nomenclature.[27] A voluntary statement made to other members of the same congregation has been held not privileged.[28] A communication made to members of a church, acting in an official capacity, has been deemed privileged.[29]

The mere fact that a communication is made to a clergyman in confidence does not sufficiently constitute a privilege because the communication is required to be penitential in character or in pursuance of the "discipline of the Church."[30] The recent trend, however, shows an expansion of coverage to communications that are not penitent in nature

---

[21] WIS. STAT. ANN. § 325.20 (1958).

[22] Annot., 22 A.L.R.2d 1152, 1153 (1952).

[23] *E.g.*, IDAHO CODE ANN. § 9-203 (Supp. 1967).

[24] *E.g.*, ARK. STAT. ANN. § 28-606 (1947).

[25] *E.g.*, IND. ANN. STAT. § 2-1714 (1933).

[26] FLA. STAT. ANN. § 90.241 (1959); GA. CODE ANN. § 38-419:1 (1953); ILL. REV. STAT. ch. 51, § 48.1 (1966); MASS. ANN. LAWS ch. 233, § 20A (Supp. 1966); ME. REV. STAT. ANN. ch. 16, § 57 (Supp. 1962); N.C. GEN. STAT. § 8-53.1 (Supp. 1965); PA. STAT. ANN. tit. 28 § 331 (Supp. 1966); S.C. CODE ANN. § 26-409 (1962); TENN. CODE ANN. 24-109 (Supp. 1967).

[27] Reece, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 65 (1963).

[28] Milburn v. Howorth, 47 Colo. 593, 108 Pac. 155 (1910) (statement made by the defendant in the presence of other members of his church, including the minister, were held not to be privileged); Commonwealth v. Drake, 15 Mass. 161 (1818) (voluntary statements to other church members confessing a crime was held admissible in the absence of a statute granting the privilege).

[29] Reulkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917) (on request a young girl appeared before the church session consisting of the pastor and three ruling elders, held that the statements were privileged communication); *Contra*, Knight v. Lee, 80 Ind. 201 (1881).

[30] *See* State v. Brown, 95 Iowa 381, 64 N.W. 277 (1895); State v. Morgan, 196 Mo. 177, 95 S.W. 402 (1906); Aford v. Johnson, 103 Ark. 236, 146 S.W. 516 (1912); Christensen v. Pestorious, 189 Minn. 548, 250 N.W. 363 (1933); *In re* Koellen's Estate, 163 Kan. 395, 176 P.2d 544 (1947); Angleton v. Angleton, 84 Idaho 184, 370 P.2d 788 (1962).

and would not necessarily be considered "confessions.[31] Since the statutes usually require that the communication be made to the clergyman in his professional capacity and in the "course of discipline enjoined by the church or denomination of the minister," some courts could possibly construe this phraseology to include only the Catholic Church. It alone requires that the communicant attend the Sacrament of Confession once a year.[32] This interpretation has been given in at least one state,[33] but all other courts that have ruled on this agree with Minnesota's court that:

> If we are to construe this statute as meaning that the only confession that is privileged is the compulsory one under the rules of the particular church, it would be applicable only if our information is correct, to the Roman Catholic Church. Certainly the legislature never intended the absurdity of having the protection extend to the clergy of but one church. . . . The "confession" contemplated by the statute . . . applies to a voluntary "confession" as well as to one made under a mandate of the church.[34]

Whether the declarant is a member of the same church as the minister or not does not appear to limit the privilege. "The clergyman's door should always be open; he should hear all who come regardless of their church affiliation."[35]

A court may inquire into the facts and circumstances surrounding and leading up to the communication to determine if it is privileged, but, for obvious reasons, it cannot compel disclosure of the communication in order to make the ruling.[36]

The determination of whether a communication is privileged or non-privileged is made by the trial judge after a consideration of all the facts and circumstances surrounding the challenged communication. The vast majority of cases will be clearly privileged or non-privileged, but it is in the twilight of these two extremes that care should be taken to prevent the disclosure of any confidential communication which the statutes have protected with a privilege.

IV. Mississippi's Position

No case has been decided in Mississippi either granting or denying the privilege. In the case of *Barnes v. State*, 23 So. 2d 405 (Miss. 1945) the question could have arisen. The defendant was accused of poisoning his wife and son-in-law. He confessed to a minister that he had killed

---

[31] MINN. STAT. ANN. § 595.02 (1945) "[N]or shall a clergyman or other minister of any religion be examined as to *any communication made to him* by any person seeking *religious or spiritual advice, aid, or comfort* or his advice given thereon in the course of his professional character, without the consent of such person. . . ." (emphasis added).

[32] 4 NEW CATHOLIC ENCYCLOPEDIA 132 (1967).

[33] *E.g.*, Sherman v. State, 170 Ark. 148, 279 S.W. 353 (1926).

[34] *In re* Swenson, 183 Minn. 602, 237 N.W. 589, 590 (1931).

[35] *Id. See* Kohloff v. Bronz Sav. Bank, 37 Misc. 2d 27, 233 N.Y.S.2d 849 (1962).

[36] *In re* Swenson, 183 Minn. 602, 237 N.W. 589 (1931).

his wife, and asked the minister to pray for him. In his trial for the murder of the son-in-law, the minister's testimony was received. Since Barnes' wife and son-in-law died from the same act, the testimony was relevant and competent on issue of whether the accused poisoned his son-in-law.

The court made no mention whatever of the privilege, nor does it appear to have been pleaded. It would be mere speculation on the author's part to predict the course the Mississippi court will take when confronted with this problem. It is possible, from the absence of any mention of the privilege, that Mississippi is operating on the presumption that the privilege does not exist.[37] If, in fact, the court is operating on this presumption, a Mississippi minister, abiding by his religious mandates, could be convicted of contempt of court and committed to prison without bail until he reveals such confidential communications.[38]

V. Conclusion and Recommendations

The opinions of most courts which have had an opportunity to discuss a ruling made in accordance with a clergy-penitent statute have founded their results upon the exigencies of public policy.[39] The weight of authority favors the granting of the privilege, and public policy demands it.

It would be unwise for any jurisdiction to blindly follow the common law rule and not substitute for it their own reasoning and experience.[40] The benefits derived from protecting the confidential communication definitely overshadows the possibility of abuse.

To deny a privilege allowing a penitent uninhibited disclosure to his spiritual advisor would be adverse to our country's established principles of freedom of religion and its atmosphere of religious tolerance.[41] Mississippi, in keeping with its reputation for religious tolerance, should adopt such a statutory privilege.

Legislators should look at the widely approved and recommended draft for a clergy-penitent statute as adopted at Rule 219, Model Code of Evidence of the American Law Institute (1942) and at Rule 29, Uniform Rule of Evidence of the National Conference of Commissioners on Uniform State Laws (1953).[42] This latter draft was approved by the American Bar Association that same year.

By passage of such legislation Mississippi can guarantee no secular intervention with that priceless, intangible relation—man's relation with his Creator.

Larry Thompson

---

[37] *See* 18 MISS. L.J. 180 (1946).

[38] MISS. CODE ANN. § 1696 (1956). "If any person subpoenaed as a witness in any case or matter, shall refuse to be sworn or affirmed, or to give evidence, he shall be committed to prison by the court, justice, master, commissioner, referee, or other person authorized to take his testimony, there to remain without bail until he shall be sworn or affirmed and give his evidence."

[39] *E.g., In re* Swenson, 183 Minn. 602, 237 N.W. 589 (1931).

[40] Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1959). "When reason and experience call for recognition of a privilege which has the effect of restricting evidence, the dead hand of the common law will not restrain such recognition."

[41] Note, *The Priest-Penitent Privilege in South Carolina—Background and Development*, 12 S.C.L.Q. 440, 453 (1960).

[42] (1) As used in this rule, (a) "priest" means a priest, clergyman, minister of

Torts—Tort Claims and Defenses in Cases of Detention of Suspected Shoplifters

In 1958 the Mississippi Legislature enacted into law section 2374-04 of the Mississippi Code. This statute grants immunity from charges of slander, false arrest, false imprisonment, malicious prosecution, or unlawful detention to a merchant or his employee who questions a person suspected of shoplifting. To qualify for this immunity the merchant must meet the following standards: he must have reasonable grounds or probable cause for believing that the person has committed the act of shoplifting; his actions must be in good faith; and he must question the suspect in a reasonable manner.

There have been two cases interpreting this statute. The purpose of this note is to examine these cases along with cases from other jurisdictions to determine the rights of merchants to question persons suspected of shoplifting and to determine the possible rights of individuals who are questioned.

There are several possible rights of action which may arise in connection with the detention of an individual. The merchant may accuse the individual of shoplifting in the presence of others. In this situation the suspect may have a right of action for slander. The merchant may use force to detain the individual and in so doing may touch his body. This would give rise to a suit for assault and battery. Finally, there may be an action for false arrest, false imprisonment, unlawful detention, or malicious prosecution.

The effect of the statute in Mississippi is to set up a defense to these actions. If the merchant can show that he had probable cause, that the questioning was conducted in a reasonable manner, and that he acted in good faith without malice, then the statute protects him.

There are several questions which immediately arise: What constitutes probable cause? Is probable cause a question of law for the judge or one of fact for the jury? What constitutes a detention? What is a reasonable investigation? Is a merchant liable for the acts of his employee? What damages is an individual entitled to if he has been falsely

---

the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization; (b) "penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof; (c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member.

(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication, (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent. As cited in Blass, *Penitent Privilege Under the New Code,* 33 Kan. B. Ass'n J. 279, 284 (1964).

detained without just cause or in an unreasonable manner or if he has been slandered? To answer these questions it will be necessary to examine the case law in each area.

First, an examination of the common law prior to the enactment of our statute would be beneficial. The case of *Collyer v. S. H. Kress Co.*[1] decided in 1936 exemplifies the common law. Plaintiff sued for false imprisonment and was awarded 1,500 dollars. The Supreme Court of California reversed. Three persons, a customer, the store detective, and her assistant, saw the plaintiff remove articles from the counter and place them in his pockets. Plaintiff was met at the door by the detective and escorted to a room for questioning. He was held there for twenty minutes. He denied the accusation and said that he had paid for the articles. He was searched and the detective found unwrapped articles for which plaintiff had no sales ticket. The detective then asked plaintiff to sign a confession. Plaintiff refused; the police were summoned, and the plaintiff was arrested, tried, and found not guilty.[2]

The question before the court was: Can a merchant detain a person suspected of shoplifting? The court held that probable cause is a defense in a false imprisonment case provided the detention was reasonable. The court held that in this case where the facts were not in dispute, probable cause was a question of law for the judge. The court found as a matter of law that the defendants had probable cause and that the detention was reasonable. The storeowner was entitled to use reasonable compulsion to effect the restraint. The only compulsion used was the threat of arrest. Plaintiff was requested to sign a confession during the detention. Plaintiff was searched during the detention and was held for twenty minutes. The court held that these acts were reasonable and reversed the verdict for the plaintiff.[3]

Thus, the courts in the absence of a statute applied the tests of probable cause and reasonableness. So it would seem that the Mississippi statute has simply codified the common law.

Under the Mississippi statute probable cause can also be a defense to a charge of slander arising from a false accusation of shoplifting. Prior to the statute, the merchant could set up the defense that he was acting under a qualified privilege. In the case of *Montgomery Ward & Co. v. Skinner*,[4] decided in 1946, the supreme court stated the essential elements of a qualified privilege. An accuser is protected by a qualified privilege if he acts in good faith, if he has an interest to uphold, if the statement is limited in its scope to the purpose of protecting the interest, and finally if publication is made in the proper manner and to the proper parties only. If the plaintiff can show malice or that the statement was made in the presence of disinterested third parties, then the privilege is negated.[5]

---

[1] 5 Cal. 2d 175, 54 P.2d 20 (1936).

[2] *Id.*

[3] *Id.*

[4] 200 Miss. 44, 25 So. 2d 572 (1946).

[5] *Id.*

The Mississippi statute allows the merchant who is sued for slander to set up the defense that he was acting under a qualified privilege if he can show that he had probable cause and that he made the investigation in a reasonable manner.[6] Thus, it seems that the statute has added little to the common law defenses of a merchant.

The first case in Mississippi decided after the enactment of our statute was *J. C. Penney Co. v. Cox.*[7] The Mississippi Supreme Court affirmed a judgment for two thousand dollars for Mrs. Cox on charges of malicious accusation, false arrest, and false imprisonment.[8]

Mrs. Cox testified that she was standing at the deodorant counter when the assistant store manager came up to her, grabbed her by the arm, and demanded that she pay for the deodorant which he said she had stolen. He forced her to empty the contents of her purse in front of several customers. No stolen articles were found, and the storeowner apologized. The defendant testified that someone in the store had told a clerk that she believed Mrs. Cox had stolen something. This information was related to the manager who apprehended Mrs. Cox. Defendant appeals on the grounds that he should have been granted a directed verdict. The court said that probable cause is a statutory defense if the detention is reasonable. However, the court held that in this case the mere belief of a third person did not constitute probable cause, that even if the manager had probable cause, the investigation was not conducted in a reasonable manner, and that therefore, the defendant exceeded the qualified privilege.[9]

The only other case decided in Mississippi interpreting the statute is the case of *Southwest Drugstores v. Garner.*[10] In that case Mrs. Garner was awarded eight thousand dollars in a suit for slander and unlawful detention. Mrs. Garner testified that she went to the cosmetic counter to find a bar of soap. She was aided by a saleslady and found the bar of soap. She then went to the cashier where she paid for the soap. When Mrs. Garner started to her car, the storeowner followed her and in a loud voice told her to stop and let him see what was in her bag. He then accused her of stealing a bar of Lowilla soap and told her to come back into the store. Several persons nearby heard the accusations. Mrs. Garner went back into the store and the cashier told the storeowner that Mrs. Garner had paid for the soap in her possession. The storeowner apologized, but Mrs. Garner began crying and as a result of the incident became sick and had to see a doctor.[11]

The storeowner testified that he saw Mrs. Garner holding a bar of Lowilla soap at the cosmetic counter. After Mrs. Garner left, he asked the cashier if Mrs. Garner had paid for a bar of Lowilla soap. The cashier told him that she had not. Appellants alleged two errors. First, they contended that the court should have granted a peremptory instruction for the defendants because the owner had probable cause to

---

[6] Southwest Drug Store v. Garner, 195 So. 2d 837 (Miss. 1967).

[7] 246 Miss. 1, 148 So. 2d 679 (1963).

[8] *Id.*

[9] *Id.*

[10] 195 So. 2d 837 (Miss. 1967).

[11] *Id.*

believe that Mrs. Garner had committed the offense of shoplifting and under the Mississippi statute the investigation was privileged. Secondly, appellants alleged that they were entitled to an instruction that the owner acted upon an occasion of privilege and that he acted upon probable cause to protect his merchandise and was therefore not liable for slander or false imprisonment. Appellants contended that the court should determine as a matter of law whether a privilege existed and whether the defendant had probable cause on which to base his investigation. Defendant argued that he had probable cause. He testified that he observed Mrs. Garner and believed by her actions that she was shoplifting. He contended that her actions gave him probable cause to investigation and that he acted in good faith.[12]

The court held that, granting that the owner had probable cause to investigate and that the occasion was one of qualified privilege, the privilege was lost by the manner in which it was exercised. The inquiry was not made in a reasonable manner. In exercising the privilege of inquiry the merchant should go no further than his interest or duties require. When the defendant accused Mrs. Garner of shoplifting in a loud voice in the presence of others, he exceeded the privilege. The court also said that the defendant was careless and negligent in his method of ascertaining whether or not Mrs. Garner had paid for the soap. He should have asked the cashier if Mrs. Garner had purchased a bar of soap rather than a bar of Lowilla soap. Thus, the court denied defendant's peremptory instructions and upheld the verdict for the plaintiff.[13]

In this case the court held that probable cause is a question of law for the court only if there is no conflict in the evidence, but if there is conflicting evidence on the issue of probable cause, then it is a jury question. In this case the evidence on probable cause was conflicting and was properly submitted to the jury.[14]

The court also discussed the issue of damages. The court said that if the jury found that the defendant had exceeded the privilege, it could infer malice and inflict punitive damages. The court held that a verdict for eight thousand dollars was not so large as to evidence bias or prejudice on the part of the jury. The acts of the defendant exhibited his frame of mind. He did not care whether his accusations were true or false. Maliciousness relates to the frame of mind of the person who speaks the words. If the words are spoken recklessly or without knowing or caring whether or not they are true, then the statement is malicious and plaintiff is entitled to punitive damages.[15]

The case of *Scott-Burr Stores Corp. v. Edgar*[16] was decided before the Mississippi statute was enacted. This was an action for assault and battery and slander. Plaintiff went into defendant's store and walked up to a counter. He removed a card with a box of razor blades on it. He took the box of blades off the card and then replaced both the card and the box on the counter. During this time he took a package of cigarettes out of his pocket and then put them back in his pocket. A

---

[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 181 Miss. 486, 177 So. 766 (1938).

saleslady witnessed this. She thought that the cigarettes were the razor blades. When plaintiff left she found the empty card and did not find the razor blades. She related these facts to the manager. Plaintiff testified that the manager seized him by jerking him and pulling him back into the store. Once in the store the manager accused the plaintiff of shoplifting. At the first trial the plaintiff was awarded fifteen thousand dollars. The supreme court held that the damages were excessive and that the trial court erred in submitting the question of punitive damages on the charge of slander to the jury. A new trial was held and plaintiff was awarded ten thousand dollars. Defendant appealed again. The Mississippi Supreme Court reversed again and ordered a new trial on the first charge of assault and battery only. The court held that the trial court properly submitted to the jury the question of whether or not plaintiff was entitled to recover actual and punitive damages for the assault and battery. The court held that defendant was entitled to a peremptory instruction on the issue of slander. Since the manager honestly believed in good faith that the plaintiff had taken the blades, his accusations were made under a condition of qualified privilege. Thus, it was necessary for plaintiff to prove actual malice on the part of the store manager in order to maintain the second count of slander. The plaintiff failed to prove malice, and therefore the defendant was entitled to a peremptory instruction on the issue of slander.[17]

This case is important for its discussion of the question of agency. Was the manager acting in the scope of his employment when he committed the assault and battery on the plaintiff and made the slanderous statement about him? The court held that he was even though the owner had expressly instructed him not to search any customer or accuse any customer of stealing. The manager was also instructed that if a witness stated that a person had stolen something, the police should be called. The court held that these instructions did not prohibit the manager from trying to detect and apprehend shoplifters. It simply limited his method. The authority to have the customer arrested implies a duty to investigate. The acts of the manager in this case were done in connection with such an investigation. Therefore, the manager was acting in the scope of his employment and the store was liable for his acts.[18]

In the case of *Howell v. Viener*[19] plaintiff brought suit for false imprisonment against a merchant who called upon a police officer to make an arrest. The court held that since the defendant directed the officer to make the arrest, he stands as if he had made the arrest.[20] Thus, if a store owner asks a policeman to arrest a person whom the store owner suspects of shoplifting, the store owner will be liable.

Several states have statutes which are similar to the Mississippi statute. It will be helpful to examine some of the cases arising under those statutes in order to better understand our own statute.

---

[17] *Id.*

[18] *Id.*

[19] 179 Miss. 872, 176 So. 731 (1937).

[20] *Id.*

The case of *Delp v. Zapp's Drug & Variety Stores* [21] was decided under the Oregon statute [22] which provides that if a merchant has reasonable cause to believe that a person has committed the crime of shoplifting, he may detain and interrogate the person for a reasonable time and in a reasonable manner.

In this case the store detective saw the plaintiff pick up a package of dye and put it in her coat pocket. Plaintiff then went to the cashier and paid for the other merchandise which she had purchased but did not pay for the dye. She then left the store. The store detective approached her and asked her to come to the back of the store. When they reached the back of the store, the detective asked plaintiff if she had taken an item which she had not paid for. The plaintiff reached in her pocket and found the dye and said that she did not intend to take it. Plaintiff then left the store and was followed by two employees of the store. The store detective called the sheriff and pointed out the plaintiff. Police officers stopped the plaintiff and required her to take everything out of her shopping bag and checked the items against her sales slip. The plaintiff was held in the car for thirty minutes. No charges were filed and plaintiff left. Plaintiff brought an action against the store for false imprisonment, and the trial court found for the defendants.[23]

The court held that the detective had reasonable cause to believe that the plaintiff had committed the crime of shoplifting. Under the Oregon statute the detective could detain and interrogate the plaintiff in a reasonable manner and for a reasonable time. The court said that if these is conflicting evidence on the issue of reasonable cause, the jury decides the facts, but the court decides the question of reasonable cause by its instructions to the jury. In this case the court held that the facts were undisputed and that the defendants did act with reasonable cause. The court said that the issue of reasonableness of the manner of inquiry is a jury question unless the court concludes that even accepting the evidence most favorable to the plaintiff, the detention was reasonable.[24]

Plaintiff also contended that the following of the plaintiff by the store employees was a detention, that the officers wrongfully detained her, and that the defendants were liable. The court held that surveillance did not constitute the confinement necessary to maintain an action for false imprisonment. The court also held that the defendants were not liable for the actions of police officers. If an officer makes an arrest at the direction of a private individual, then that individual is responsible for the arrest. However, if the individual simply lays the facts before the officer and the officer decides to arrest, then the officer is responsible. In this case the defendants simply told the facts to the officer and the officer made the decision to arrest. Thus, the defendants were not liable for the arrest.[25]

There was a strong dissent in this case. The dissenting judge pointed out that even though there was probable cause to detain the plaintiff on

---

[21] 238 Ore. 538, 395 P.2d 137 (1964).

[22] ORE. REV. STAT. § 164.392 (Supp. 1965).

[23] 238 Ore. 538, 395 P.2d 137 (1964).

[24] *Id.*

[25] *Id.*

the first occasion, there was no further probable cause to apprehend her the second time.[26]

The case of *Lukas v. J. C. Penney Company*[27] was also decided under the Oregon statute. In this case the Oregon Supreme Court upheld a judgment for the plaintiff in a case of false detention. Plaintiff and her granddaughter were in Penney's, and the plaintiff tried on a white dress. The saleslady who was waiting on the plaintiff went to wait on another customer. Plaintiff put the dress back on the rack and left the store. When the saleslady looked in the dressing room and could not find the dress, she told another saleslady. The two ladies made a canvass of the racks and could not find the dress. They reported this to the store manager who accosted the plaintiff on the street and in a boisterous voice demanded to search her shopping bag. Plaintiff refused to give him the bag, and the manager tried to jerk it away from her. Plaintiff was afraid and allowed the manager to search the bag. He did not find the dress. On the following day the plaintiff went back to the store and found the white dress on the rack where she had left it. Defendant alleged as error the denial of his motion for a directed verdict. The court held that the reasonableness of the method and the time of detention were jury questions. Since the jury found for the plaintiff, the court could not direct a verdict. The question of reasonable cause is a jury question if there is conflicting evidence. In this case the testimony of the plaintiff that she returned the dress and that she saw it on the rack on the next day is sufficient evidence to make the question of reasonable cause a jury question. Thus, the court did not err in refusing to instruct the jury that defendant had reasonable cause.[28]

> In this case the court defined false imprisonment as an . . . imposition of unlawful restraint upon another's freedom of movement. . . . The essential thing is the restraint of the person. This may be caused by threats, as well as by actual force; and the threats may be by conduct or by words. . . . We believe that the combination of anger, threats, force, fear and struggle for the shopping bag . . . were capable of supporting a finding that the defendants restrained the movements of the plaintiff.[29]

Louisiana also has a statute similar to the Mississippi statute. The Louisiana statute[30] provides that a merchant may use reasonable force to detain for questioning any person suspected of shoplifting if he has reasonable grounds to believe that the person has committed the offense, and the merchant will not be civilly liable for false imprisonment if reasonable grounds exist.

The case of *Wilde v. Schwegmann Bros. Giant Supermarkets*[31] was decided under the Louisiana statute. Mrs. Wilde was awarded two thousand five hundred dollars for false imprisonment. Mrs. Wilde purchased several items in the store and went to the cashier and paid for

---

[26] *Id.*

[27] 233 Ore. 345, 378 P.2d 717 (1963).

[28] *Id.*

[29] *Id.* at 720-21.

[30] La. Code Crim. Proc. Ann. art. 215 (1967).

[31] 160 So. 2d 839 (La. App. 1964).

them. She then went back and bought a ladder which was on sale and paid for it. Then the store detective stopped her and accused her of shoplifting. He escorted her to a small room with no windows, questioned her, and asked her to sign a confession. She refused and asked the detective to call either the police or her husband. The detective refused to call anyone and refused to allow Mrs. Wilde to leave until she signed the confession. In distress Mrs. Wilde signed the confession.[32]

The Louisiana Supreme Court first answered the question: Did the detective have reasonable grounds for believing that Mrs. Wilde had taken an item of merchandise? The detective took Mrs. Wilde to the cashier and asked the cashier if Mrs. Wilde had paid for a buffer pad which the detective said that he saw Mrs. Wilde take. The cashier said that Mrs. Wilde had not paid for the buffer pad. The court held that the detention was unreasonable because the detective made no attempt to check Mrs. Wilde's purchases against her sales slip. This was the only way that he could ascertain whether or not Mrs. Wilde had taken merchandise which she had not paid for. The court held that the purpose of the detention was to force the plaintiff to sign a confession, not to ascertain her guilt or innocence. The court further held that there was no believable evidence that plaintiff concealed or did not pay for the buffer pad. Defendant who supposedly watched plaintiff closely did not see her go back and purchase the ladder. The detective was uncertain of his suspicion. The court held that his actions were not reasonable. The statute was designed to allow the merchant an opportunity to investigate, not to intimidate. The court held that plaintiff was falsely detained from the time that her request to call her husband was refused. The verdict was held excessive and reduced to one thousand five hundred dollars because Mrs. Wilde did not contend that she was physically injured.[33]

In the case of *Peak v. W. T. Grant Company*[34] a Missouri statute[35] similar to the Mississippi statute was held not to apply to the false detention of a person who came to the aid of another person being questioned for shoplifting. The plaintiff and her sister and little brother were shopping in Grant's. Plaintiff's sister, Candy, had a clutch purse. An employee of Grant's observed Candy trying to push down the contents of her purse and trying to close it. The employee approached Candy and she testified that Candy's face turned red and she seemed scared and left in a hurry. The employee pointed out Candy to the store detective. He and another security officer watched her. The detectives testified that the actions of Candy were evasive and suspicious. When Candy and her brother started to leave, the store detective stopped her and asked to see the contents of her purse. She refused and her brother ran to get Candy's sister, the plaintiff in this case. The detective took Candy's arm. Plaintiff arrived and tried to take Candy to her mother. The detective grabbed the plaintiff and started shaking her. She screamed and he threw her into a rack of clothes. He dragged her by the arm across the floor and slapped her. Then the children's mother arrived. She

---

[32] *Id.*

[33] *Id.*

[34] 386 S.W.2d 685 (Mo. App. 1964).

[35] MO. ANN. STAT. § 537.125 (Supp. 1966).

told Candy to show the detective the contents of her purse. She did, and no stolen items were found. The court held that the defendant was not entitled to the Missouri statutory defense because Candy, not the plaintiff, was suspected of shoplifting.[36]

The court also discussed the question of agency. It held that when an employee is authorized by the store to arrest or detain a shoplifter, the employer is liable; and if the acts of the employee meet the test of actual malice, the employer is liable for punitive damages. This is true even if the acts of the employee are expressly forbidden in instructions from the employer.[37]

On the issue of damages the court held that the plaintiff was entitled to general damages for injuries sustained naturally and proximately from the unlawful act. This includes mental suffering, humiliation, disgrace, injury to feeling and reputation, and physical injury. The court held that a verdict of two thousand five hundred dollars was not excessive. In deciding the amount of punitive damages the jury can consider the degree of malice, the age, sex, health, and character of the plaintiff, and the affluence of the defendant. In this case a verdict of four thousand dollars punitive damages was not excessive.[38]

An Oklahoma statute allows a merchant to detain a person for a reasonable length of time and in a reasonable manner if there is probable cause for believing that the person has taken merchandise.[39] The case of *Doyle v. Douglas*[40] was decided under that statute. The plaintiff alleged that she purchased and paid for several items and walked out of the store. The defendant then forcibly seized her and falsely and publicly and maliciously accused her of shoplifting. Plaintiff accompanied the defendant into the store. Her shopping bag was searched and her coat was removed and examined. The trial judge sustained a demurrer to the question of punitive damages because plaintiff introduced no evidence of malice. The jury then found for the defendant. The defendants alleged that they had probable cause for believing that the plaintiff had stolen the articles and defendants denied that they seized or publicly accused the plaintiff. Defendants produced testimony to the effect that a witness three weeks before had seen plaintiff taking items from the store in order to show probable cause for detaining plaintiff. The Supreme Court of Oklahoma held that this evidence was admissible to show probable cause and that in this case such evidence supported the finding of the jury that there was probable cause. The court also allowed the store owner to introduce evidence that shoplifting was a problem for store owners because plaintiff did not object to this evidence and did not show that the evidence was incompetent and prejudicial. On the issue of punitive damages the court held that the evidence did not show that the detention was done maliciously, and therefore the question of punitive damages was properly withdrawn from the jury.[41]

---

[36] 386 S.W.2d 685 (Mo. App. 1964).
[37] *Id.*
[38] *Id.*
[39] OKLA. STAT. tit. 22, § 1341 (1961).
[40] 390 P.2d 871 (Okla. 1964).
[41] *Id.*

The court found from the evidence that the detention was reasonable and was for a reasonable length of time and that the evidence sustained the verdict of the jury. The court said that probable cause does not mean actual or positive cause and does not depend on the guilt or innocence of the suspect. If the facts which are known to the merchant would justify a prudent and cautious man in believing that a person has committed the offense, the probable cause exists.[42]

The state of New Mexico has a statute[43] which provides that a merchant may detain a person for a reasonable time and in a reasonable manner in order to recover goods or to deliver the person to the police if the merchant has reasonable cause for believing that the person has taken goods. The statute authorizes a police officer to arrest the person on a declaration by the merchant.

The case of *Stienbaugh v. Payless Drug Store*[44] was decided under this statute. In that case an employee of the drugstore saw the plaintiff take a box of merchandise from the shelf and put it in her purse. He later observed the item in plaintiff's purse. He reported this to the manager who believed him. The defendants accused the plaintiff of shoplifting in the presence of disinterested third persons and then called the police. When the police arrived, the manager pointed out the plaintiff and requested that she be detained. Plaintiff testified that she put the box back on the shelf and other witnesses testified that the box was found in the store where plaintiff had left it. The question before the court was: Did the defendant have reasonable cause to detain the plaintiff? The Supreme Court of New Mexico held that the denial by the plaintiff that she took the box placed the issue of probable cause in conflict. If she had not denied taking the box or if the box had been found in her purse, then no conflict would have existed and the court would have found as a matter of law that there was a reasonable cause. Thus, probable cause was a jury question and the jury found for the plaintiff. This finding was supported by the evidence.[45]

The court also upheld the jury's finding that the accusations were made in front of third persons and that the accusations were false and resulted in injury to plaintiff's character and reputation. The court held that the accusation of shoplifting is actionable per se. The court further said that even if the jury had found probable cause, and even if the detention were privileged under the statute, it would have been for the jury to decide whether or not the accusation was made in the exercise of the statutory privilege. The jury verdict for plaintiff was affirmed.[46]

Thus, in the states which have statutes similar to the Mississippi statute, the courts discuss the same issues of probable cause, reasonable detention, and qualified privilege that were discussed by the Mississippi Supreme Court in the two cases arising under our statute.

---

[42] *Id.*

[43] N.M. STAT. ANN. § 40A-16-22 (Supp. 1967).

[44] 75 N.M. 118, 401 P.2d 104 (1965).

[45] *Id.*

[46] *Id.*

In conclusion, it seems that the Mississippi statute as interpreted and applied by the Mississippi Supreme Court does an excellent job of balancing the interest of store owners and persons suspected of shoplifting. The store owner is allowed to protect his interest by questioning a suspect, but he must follow certain guidelines which are designed to protect the individual. He must have probable cause to investigate the individual. He must conduct the investigation in a reasonable manner, and he must be careful not to commit any act against the suspect which is not necessary to protect his interest, such as accusing the suspect in the presence of disinterested third persons. If the merchant violates any one of these guidelines, then the suspect will be entitled to damages. Thus, the merchant is privileged to protect himself from the shoplifter, and the suspect can be assured of recourse if the merchant abuses that privilege.

David B. Clark

Urban Renewal—The Evolving Concept of "Public Use"

Recent events have illustrated that the decay of large segments of the urban community is one of the most urgent domestic problems of the day. The nation-wide urban renewal program which is currently being conducted pursuant to state[1] and federal statutes[2] is an attempt to solve the problems of financing, land acquisition, and public control for the purpose of alleviating the presently unacceptable conditions and insuring adequately planned communities for the future. As phrased in the Congressional Declaration of National Housing Policy, the program's goal is to provide "a decent home and suitable living environment for every American family. . . ."[3] Not surprisingly, the implementation of a large-scale program designed to remedy the existing situation and achieve the lofty stated goal has created a significant alteration of the traditional concept of "property rights." The purpose of this note is to examine the evolving concept of "public use" as it applies to urban renewal projects with particular emphasis upon the provisions of the Mississippi Urban Renewal Law of 1958.[4]

A recent case, *Paulk v. Housing Authority of City of Tupelo*,[5] involves important considerations related to the land acquisition phase of the urban renewal program. On June 20, 1961, the Housing Authority of the City of Tupelo approved an urban renewal project in accordance with statutory requirements.[6] The land to be redeveloped included two lots belonging to Joyce Paulk within the designated area. The plan provided for part of the land to be used for streets and part of the property was designated for re-sale to private persons for commercial re-development. At the time the plan was adopted, a dwelling was located on parcel number one and an outdoor toilet and a barn occupied

[1] Miss. Code Ann. §§ 7342-01 to -20 (Supp. 1966).
[2] 42 U.S.C. §§ 1441-1465 (1965).
[3] 42 U.S.C. § 1441 (1965).
[4] Miss. Code Ann. §§ 7342-01 to -20 (Supp. 1966).
[5] 195 So. 2d 488 (Miss. 1967).
[6] Miss. Code Ann. § 7342-06 (Supp. 1966).

parcel number two of the Paulk property. After the Housing Authority initiated condemnation proceedings against the property in March of 1963, Paulk cleared parcel number two prior to a final judgment in the case, and the Housing Authority removed the dwelling from parcel number one following a judgment in favor of the city in September. Subsequently, the September, 1963, judgment was voided because of a procedural error in the court of eminent domain, and condemnation proceedings were again initiated in April of 1965. Prior to the institution of valid condemnation proceedings the land was cleared and the "slum" or "blighted" conditions removed. Paulk obtained a temporary writ of prohibition, but on a motion for a permanent writ, the Circuit Court of Lee County dissolved the temporary writ of prohibition and dismissed the petition. Paulk then appealed to the Mississippi Supreme Court.

The appellant initially contended that the land was not being acquired for a "public use" as required by the Constitution[7] because the plan provided for the land to be sold by the Housing Authority to private interests for redevelopment. Paulk contended that this arrangement amounted to an unconstitutional "private use." Although the utilization of private enterprise is encouraged to "the greatest extent . . . feasible"[8] by the state statute and recommended to "serve as large a part of the total need it can"[9] in the Congressional Declaration of National Housing Policy, the feature of turning over acquired property to private interests for redevelopment is the most frequently raised objection concerning the validity of proposed redevelopment.[10]

In spite of the "private use" objection the vast majority of redevelopment acts has been sustained generally on the ground that the urban renewal of "slum" or "blighted" areas fulfills the required "public purpose" or "public use."[11] In fact, after comparatively recent decisions in Georgia[12] and Florida,[13] only South Carolina[14] continues to sustain the "private use" argument as it applies to urban renewal,[15] and the South Carolina standard apparently does not apply if the purpose of the redevelopment is to provide "better, low-cost housing to the present occupants of the area."[16] The Tupelo redevelopment plan did not contemplate a housing project for the Paulk property; therefore, in at least one state, Paulk's contention would be deemed meritorious.

In accordance with the majority view *Pearl River Water Supply Dist. v. Brown*[17] enunciated the principle that "if the primary and paramount purpose of the taking is for public use . . . it will not be defeated

---

[7] MISS. CONST. art. 3 § 17.

[8] MISS. CODE ANN. § 7342-03 (Supp. 1966).

[9] 42 U.S.C. § 1441 (1965).

[10] Annot., 44 A.L.R.2d 1414 (1955).

[11] *Id.*; 44 A.L.R.2d 1414 (Supp. 1965).

[12] Bailey v. Housing Authority, 214 Ga. 790, 107 S.E.2d 812 (1959).

[13] Grubstein v. Urban Renewal Agency, 115 So. 2d 745 (Fla. 1959).

[14] Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956).

[15] Annot., 44 A.L.R.2d 1414 (1955); *id.* (Supp. 1965); Grubstein v. Urban Renewal Agency, 115 So. 2d 745, 753 (Fla. 1959).

[16] 228 S.C. 563, 573, 91 S.E.2d 280, 284 (1956).

[17] 248 Miss. 4, 156 So. 2d 572, 158 So. 2d 694 (1963).

because some incidental private benefit or use results."[18] The Mississippi Supreme Court followed this rationale in subsequent decisions[19] and relied upon similar reasoning in *Paulk* by stating that the ultimate use of the land by private persons was merely incidental to the paramount public purpose of urban renewal and slum clearance; therefore, the contemplated action of the Housing Authority was constitutional.

Certainly the courts have not always interpreted the phrase "public use" so broadly.[20] Obviously the concept has radically evolved since Sir William Blackstone observed:

> The law will not authorize a violation of the right of property, even for the public good . . . In vain, may it be urged, that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even any public tribunal to be judge of this common good, and to decide on its expediency.[21]

The court's rejection of Paulk's first contention that the land was not being acquired for a "public use" because of the Housing Authority's intention to sell the land to private concerns for redevelopment appears consistent with the current view of the United States Supreme Court as expressed in *Berman v. Parker*.[22] *Berman* upheld the District of Columbia Redevelopment Act of 1945[23] which declared the acquisition of real property and the sale of such property for development a taking for a "public use."[24] After observing that when the legislature speaks "the public interest has been declared in terms well-nigh conclusive," Mr. Justice Douglas said, "The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one."[25] With regard to the problem of selling acquired property to private interests for redevelopment, the argument made in *Berman* was similar to Paulk's first contention. The *Berman* court disallowed this thesis with the following remarks:

> Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.[26]

Paulk's second contention was that since the area had been cleared and was no longer "blighted," no necessity existed for taking the vacant land. Several of the issues raised by Paulk's argument concerning the acquisition of vacant or "open" land for urban renewal purposes bear

---

[18] *Id.* at 19, 156 So. 2d at 577.

[19] Pearl River Valley Water Supply Dist. v. Wood, 248 Miss. 748, 160 So. 2d 917 (1964); Wright v. Pearl River Valley Water Supply Dist., 250 Miss. 645, 167 So. 2d 660 (1964).

[20] *See generally* M. ANDERSON, THE FEDERAL BULLDOZER 183-93 (1965).

[21] BLACKSTONE'S COMMENTARIES ON THE LAW 74 (B. Gavit ed. 1941).

[22] 348 U.S. 26 (1954).

[23] D.C. CODE §§ 5-701 to 5-719 (1961).

[24] D.C. CODE § 5-701 (1961).

[25] 348 U.S. 26, 32 (1954).

[26] *Id.* at 33.

importantly upon the achievement of the urban renewal program's overall goal and merit close examination. Therefore, prior to considering the correctness of the Court's rejection of Paulk's second contention, an analysis of certain questions raised by the appellant's argument is required.

The view expressed in *Pearl River Valley Water Supply Dist. v. Brown*[27] and followed in *Paulk* to the effect that the question of necessity is essentially legislative and that the courts will interfere "only when abuse of discretion or fraud is shown"[28] appears consistent with Mr. Justice Douglas' language in *Berman v. Parker*.[29] An indication of what constitutes an "abuse of discretion" is contained in *Housing Authority of City of Wilson v. Wooten*.[30] In that case the court stated that a "manifest abuse of discretion" did not occur although the land sought to be condemned was approximately ninety percent vacant. This decision appears consistent with the weight of authority which holds that because some of the property in an area designated for redevelopment is vacant or contains structures innocuous by themselves, the taking is not invalidated.[31] Another case in point is *Oliver v. City of Clairton*,[32] where the court noted that the Urban Redevelopment Law[33] defined a "redevelopment area" as being "improved or unimproved" and stated that the challenged redevelopment proposal would be upheld "even though the redevelopment area may be predominately open, vacant or unimproved."[34] In addition, the fact that the federal constitution is not violated by the acquisition of vacant lands is indicated by the Supreme Court's denial of certiorari in *Redevelopment Agency v. Hayes*[35] which dealt with an area approximately eighty-five percent "vacant and undeveloped."[36]

The *Hayes* case also bears significantly upon the validity of the acquisition of vacant land in Mississippi for urban renewal purposes because of the close resemblence between portions of the California Community Redevelopment Law[37] and the Mississippi Urban Renewal Law.[38] Under the Mississippi statute a municipality may not "approve an urban renewal project for an urban renewal area unless the governing body has, by resolution, determined such an area to be a slum area or a blighted area or a combination thereof. . ."[39] The question raised by this requirement is whether "open" or vacant land can be considered

---

[27] 248 Miss. 4, 156 So. 2d 572, 158 So. 2d 694 (1963).

[28] *Id.* at 20, 156 So. 2d 572 at 578.

[29] 348 U.S. 26, 32 (1954).

[30] 257 N.C. 358, 126 S.E.2d 101 (1962).

[31] Annot., 44 A.L.R.2d 1414 (1955); *id.* (Supp. 1965).

[32] 374 Pa. 333, 98 A.2d 47 (1953).

[33] 35 PA. STAT. ANN. §§ 1701-19 (1964).

[34] 35 PA. STAT. ANN. § 1703(n) (1964).

[35] Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 266 P.2d. 105 (1954), *cert. denied* Van Hoff v. Redevelopment Agency, 348, U.S. 897 (1954).

[36] *Id.*; 266 P.2d at 110.

[37] CAL. HEALTH & SAFETY §§ 33000-33673 (West 1967).

[38] MISS. CODE ANN. §§ 7342-01 to -20 (Supp. 1966).

[39] MISS. CODE ANN. § 7342-06(a) (Supp. 1966).

"blighted." The statutory definition of a "blighted area" in Mississippi[40] and the California definition of the same phrase[41] possess may similarities. The fact is significant in light of the holding of the California court that an area eighty-five percent vacant was "blighted." Therefore, although the *Hayes* decision is, of course, not controlling in Mississippi, that case is authority for declaring Paulk's vacant property "blighted" and subject to acquisition for redevelopment even if the necessity question is determined at the time condemnation proceedings are initiated rather than at the time the need to take the property is "recognized."

Also, even land that is "clear, open, and free of slum or blight conditions" can be taken along with other property under the so-called "area concept."[42] This is important where a landowner claims that, regardless of the neighborhood conditions, his particular property is not subject to condemnation because his land is not a "slum" or "blighted" area. Such a claim seems to be the essence of Paulk's second contention, and ample authority to reject this argument exists. Although *Berman v. Parker*[43] involved a different factual situation, the United States Supreme Court made the following observation concerning the contention of an individual landowner that his particular property did not constitute a "slum or blighted" area:

> If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.[44]

Clearly Paulk's second argument raised basic questions of great significance to Mississippi's urban renewal program; however, the court's rejection of his contention appears to be in accord with the better and majority view.

Although the majority of the *Paulk* Court refused to treat the property as vacant or "open" for determination of the necessity question, the preceeding discussion illustrates that vacant land has been validly acquired for redevelopment on a number of occasions. In fact, the only case which could be found holding that the acquisition of vacant property was not within the statutory scheme[45] was decided on the basis of wording not found within the Mississippi statute. However, Paulk's final claim to the effect that the property should have been regarded as "open land" because it was vacant in 1965 when the valid eminent domain proceedings were initiated rests on firmer ground than his first two contentions in view of the statutory requirement for the taking of "open land."[46] If "open land" is to be taken for non-residential uses, as was the situation in *Paulk*, the following determinations must be made:

---

[40] MISS. CODE ANN. § 7342-18(i) (Supp. 1966).

[41] CAL. HEALTH & SAFETY CODE § 33032 (West 1967), formerly § 33042 (West 1955).

[42] Annot., 44 A.L.R.2d 1414 (1955).

[43] 348 U.S. 26 (1954).

[44] *Id.* at 35.

[45] Beebe Improvement Corp. v. City of New York, 129 N.Y.S.2d 263 (Sup. Ct. 1954).

[46] MISS. CODE ANN. § 7342-06(d) (Supp. 1966).

> [T]he local governing body shall determine that such non-residential uses are necessary and appropriate to facilitate the proper growth and development of the community . . . which acquisition may require the exercise of governmental action, as provided in this act, *because of* defective or unusual conditions of title, diversity of ownership, tax delinquency, improper subdivision, outmoded street patterns, deterioration of site, economic disuse, unsuitable topography or faulty lot layouts, the need for the correlation of the area with other areas of a municipality by streets and modern traffic requirements, or other conditions which retard development of the area.[47] (Emphasis added.)

Since the required determinations for taking "open land" were not made under the 1961 resolution, the court's thesis that Paulk's land should not be considered "open," even though the property was "clear and vacant" when eminent domain proceedings were commenced, assumes paramount importance in view of the previously quoted portion of § 7342-06(d). The Court avoided the need for a comprehensive discussion of the issues pertinent to this argument by formulating the proposition that the question of public necessity is to be determined at the time the need to acquire the property is recognized. With regard to urban renewal land acquisition, this proposition allows necessity to be decided on the basis of the property's condition at the time the plan is adopted, not on the basis of the property's condition when condemnation proceedings are initiated. The court cited no authority for this crucial proposition, and no case involving a similar situation in an urban renewal project could be found.

However, some authority not involving urban renewal land acquisition indicates that the necessity question should be decided at the time of the condemnation proceedings rather than when the need to take the land is "recognized." In *Graham v. City of Duncan*[48] the city destroyed a crop of broomcorn on land under condemnation proceedings before a final judgment in the case was rendered. The farmer, Graham, did not contest the necessity or the extent of the taking at the time of the eminent domain trial. He subsequently initated a separate action for damages to his crop and was held to have waived his objection to the destruction of the crop because of his failure to present these issues at the condemnation proceedings. In determining that Graham could have litigated the necessity question at the eminent domain trial, the court noted:

> Need for taking the particular property and the extent of the taking and compensation for the taking are to be *judged by the conditions at the time of the taking.*[49] (Emphasis added.)

Another case, *Soden v. State Highway,*[50] involved a claim that the highway department was seeking to condemn land which could not be needed for "many years" and was in effect speculating in land values. The court

---

[47] *Id.*

[48] 354 P.2d 458 (Okla. 1960).

[49] *Id.* at 462.

[50] 192 Kan. 241, 387 P.2d 182 (1963).

expressly stated that once land has been properly condemned because of an apparent necessity, abandonment is not required because of changed conditions which eliminate the need for immediate construction. The opinion expressed the view that in testing the validity of the charges of "arbitrary conduct, bad faith, or abuse of discretion, *the conditions existing at the time of the condmenation* are to be considered, not the conditions which may exist at a much later date."[51] (Emphasis added.)

Two reasons aimed at protecting the landowner without hampering the legitimate "public purpose" exist which justify extending the principle declared in *Graham* and *Soden* (that necessity should be judged at the time of the condemnation proceeding) to urban renewal cases. These reasons are: (1) local public authorities should be encouraged to begin acquisition proceedings as soon as possible after the formulation of an overall plan, and (2) governmental action is wasteful where private enterprise voluntarily achieves the desired result.

Under the proposition adopted in *Paulk*, local authorities may take as long as four years before initiating condemnation proceedings without having to re-evaluate their plan in the face of changing conditions. A basic reason for the undesirability of this situation is the significant change of land values which often occurs once an area is designated for urban renewal. This problem is illustrated by the results of a study [52] wherein approximately twenty-five percent of urban landowners felt they would not be adequately compensated for property improvements if their land were taken by urban renewal. The major specific reason given by these property holders was the time lag between urban renewal announcements and actual landtaking. One of the major landowners expressed the problem thusly:

> They come around and start doing their survey, and before you know it, tenants are scared and move out. Then you're left without income for three years before they make a settlement.[53]

On the other hand, a substantial number of urban landowners contacted in the survey look to urban renewal as the only means of adequately realizing their investments.[54] This indicates that urban renewal can cause an increase in property values where an adequate buyer could not otherwise be found. Regardless of whether land values increase or decrease because of urban renewal plans, the desirability of expeditious land acquisition is obvious.

Unlike the proposition adopted in *Paulk*, the Housing and Home Finance Agency encourages local public authorities to carry out the acquisition program "expeditiously."[55] If the necessity question were determined at the time of the taking, housing authorities would be encouraged to act rapidly, thereby minimizing the inequities arising from

---

[51] *Id.* at 245-46, 387 P.2d at 185.

[52] G. Sternlieb, THE TENEMENT LANDLORD 164 (1966).

[53] *Id.*

[54] *Id.* at 168.

[55] URBAN RENEWAL MANUAL, HOUSING AND HOME FINANCE AGENCY, Part 13, Ch. 4, § 2 (1960).

the fluctuation of property values. Also, the fiction of regarding land as "slum" or "blighted" because of structures which have been demolished for several years would be avoided.

In the present case, almost two years passed between the time the Tupelo Housing Authority approved a plan including the Paulk property and the commencement of eminent domain proceedings. As a result of a procedural error in the court of eminent domain, nearly four years elapsed before successful condemnation proceedings were begun. The problem referred to above was observed by Justice Smith in dissent who noted that the cloud on the Paulk property imposed by the continuous threat of condemnation was of such effect that "it is impossible to imagine that this failed to impair and even destroy its marketability."[56] The desirability of having condemnation proceedings initiated as soon as practicable after the adoption of an urban renewal project is manifest whether property values increase or decrease as a result of announced urban renewal plans. If land values fall, the injustice of requiring landowners to shoulder the loss is apparent. If property values increase, the interest of the state is prejudiced by waiting several years before initiating condemnation proceedings. Adoption of a rule requiring the necessity question to be determined as of the condemnation proceedings would tend to allow property owners to receive a closer approximation of the "just compensation" required by the Constitution [57] and simultaneously protect the legitimate "public purpose." With regard to the "public purpose," Mississippi Code Annotated § 7342-06(d) (Supp. 1966), provides a means for taking open land such as Paulk's when the land is essential to the project. Therefore, landowners could not defeat the public interest by merely clearing land essential to an urban renewal plan and then refusing to sell.

Another reason for changing the rule is connected with the fact that the declaration of necessity of the Mississippi Urban Renewal Law [58] is basically concerned with the elimination and prevention of slums and blighted areas. Further, the legislature encourages the utilization of private enterprise to the "greatest extent" in carrying out the provisions of the Act.[59] With these expressions of legislative intent in mind it may be argued that the legislature would approve, if not require, an interpretation of the Act which encourages the practice of individual property owners remedying the "slum or blighted" conditions on their property whenever possible. If individual property owners are willing and able to voluntarily achieve the goals of urban renewal projects in order to retain their property, why insist that the government do the job anyway? Although the facts do not clearly indicate that Paulk fits into this category of landowners, the rule in *Paulk* seems to encourage the government to undertake projects which may be accomplished by individual property holders. In this case Paulk was not only willing to remove the substandard structures on his property, but publicly vowed to cooperate with the Housing Authority in carrying out the purposes of the urban renewal project. The adoption of the proposed rule need not remotely

[56] 195 So. 2d 488, 496 (Miss. 1967).

[57] U.S. CONST. Amend. V.

[58] MISS. CODE ANN. §§ 7342-01 to -20 (Supp. 1966).

[59] MISS. CODE ANN. § 7342-03 (Supp. 1966).

suggest that a landowner who is unwilling or unable to comply with the requirements of a properly organized urban renewal project should be allowed to prevent or delay the project's implementation. However, the proposed rule does suggest that "open land" should be taken only in accordance with the statute [60] and not treated as "slum or blighted" solely because of conditions which existed several years in the past. Treating land such as Paulk's as "blighted" because of formerly existing structures appears illogical and does violence to the legislative intent in establishing statutory requirements for acquiring vacant or open land.

By encouraging voluntary clearance of "slum and blighted" areas wherever feasible, substantial savings to local, state and federal governments can be realized. While it must be kept in mind that voluntary compliance by individual property owners will by no means always adequately serve the "public purpose," certainly this method of urban renewal could be utilized in a state such as Mississippi which will likely implement rather "small-scale" urban renewal projects compared to larger, more predominately urban states such as New York.[61] In addition, if the landowner's voluntary compliance is felt to serve adequately the "public purpose," several tools such as building codes and zoning ordinances are available to insure that the property does not revert to its former "slum or blighted" condition. In fact, the *Paulk* dissent states that a municipal zoning ordinance would have restricted the use of the property so that it could not revert to its former condition. Adequate restrictions on property held by owners able and willing to comply with an overall plan can be an inexpensive and effective means of eliminating and preventing "blighted" urban areas.

It is submitted that the court should have remanded the case for a determination of whether the Paulk property could be taken pursuant to the "open land" provision of Mississippi Code Annotated § 7342-06(d) (Supp. 1966). If the property could not be taken under that provision, the lots would appear to be nonessential to the successful completion of the proposed project and should have remained in the ownership of Joyce Paulk. If the property proved essential to the successful completion of the project and met the statutory requirements, the lots could have been acquired for redevelopment with the concomitant result that future landowners faced with urban renewal demands would receive a more realistic adjudication of their interests.

S. Allen Lackey

---

[60] Miss. Code Ann. § 7342-06(d) (Supp. 1966).

[61] *See generally* M. Anderson, The Federal Bulldozer 238-39 (1965).

WILLIAM S. HEIN AND COMPANY

307 Bryant Street

Buffalo, New York 14222

is now

the exclusive sales agent

for

BACK ISSUES, VOLUMES, and SETS

of the

MISSISSIPPI LAW JOURNAL

outside the State of Mississippi

Mississippi Bar Members interested in purchasing

back issues may still obtain them directly from

THE MISSISSIPPI LAW JOURNAL

BOX 146

UNIVERSITY, MISSISSIPPI

Announcing

TWO NEW IMPORTANT MISSISSIPPI PUBLICATIONS

WILLS and ADMINISTRATION IN MISSISSIPPI with FORMS ANNOTATED

By

William Eugene Morse, Jackson, Mississippi. Author of Morse's Mississippi Forms, Second Edition, Three Volumes and Co-author of Bunkley & Morse's Amis, Divorce & Separation in Mississippi.

CONTAINING:

WILLS * PROBATE * ADMINISTRATION * GUARDIAN and WARD * EMBRACING ALL STATUTORY CHANGES * ESTATES * ESTATE PLANNING * TRUSTS and TRUSTEES * HISTORY and ORIGIN of WILLS * FORMS

PREPUBLICATION PRICE $22.00

NEW SECOND EDITION

DUNN'S MISSISSIPPI WORKMEN'S COMPENSATION LAW and PRACTICE with RULES and FORMS ANNOTATED.

COMPLETELY REVISED and REWRITTEN

A Reference Guide to the Every Day Problem of Administration and Practice Before the Workmen's Compensation Commission and the Courts.

First Edition Cited by MISSISSIPPI SUPREME COURT in Over Forty Decisions in the Last Eight Years.

PRICE $25.00

Descriptive folders

mailed upon request

THE HARRISON COMPANY

Law Book Publishers

P. O. Box 4214 Atlanta, Georgia 30302

MISSISSIPPI REPRESENTATIVE

BEN A. HINSON

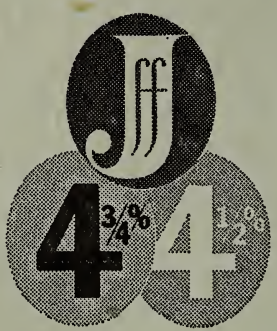
Put your trust in First Federal of Jackson

The responsibility of accounting for and safeguarding estates with attendant trust funds is a large one—and for this reason, scores of lawyers look to First Federal of Jackson as a useful partner in their efforts.

Placing trust funds with First Federal of Jackson is a sound investment; you gain maximum security for the estate, plus a solid dividend rate of 4¾% when funds are placed in Certificates of Investment. Funds are invested only in prime first mortgage home loans and commercial loans.

Accounts with First Federal of Jackson are insured by the Federal Savings and Loan Insurance Corporation, a permanent agency of the United States. One of our officers will be glad to counsel with you regarding the maximum amount of insurance available for a given trust situation. Safety and ready availability of funds are also assured by First Federal's membership in the Federal Home Loan Bank System.

For your convenience, accounts may be opened, maintained, and drawn upon entirely by mail. Of course, each account and transaction is held in the strictest confidence. For more information on how First Federal can help you in handling trust funds, please write or call. Join the growing number of Mississippi lawyers who choose First Federal of Jackson as a secure, profitable institution for the investment of estate funds.



First Federal of Jackson

...The Savings Association that cares

CAPITOL AT STATE/WESTLAND/MEADOWBROOK/YAZOO CITY/EAST BRANCH: McLAURIN MART